VISITATION AS FAMILY REGULATION*

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Legal scholarship is increasingly concerned with the centrality of family separation to child protective services in the United States. While the harms of family separation are significant, scholars have largely overlooked the most powerful tool to repair and rebuild families separated by the state: parent-child visitation. Frequent, meaningful visitation reduces the amount of time children spend in the foster system, increases the likelihood of family reunification, and results in multiple positive outcomes for children even when family reunification will not occur. But minimal legal and political oversight, combined with a lack of transparency, have obscured both the significance of visitation as a tool for reunification and the costs of denying such visitation.

This Article explores the purpose, practice, and impacts of parent-child visitation in the family regulation system, filling a significant gap in the legal scholarship. Through an in-depth analysis of existing visitation practices between parents and their children in the foster system, this Article reveals that these practices often conflict with social science research, higher court decisions, and the constitutional rights of parents and children. Fundamentally, this Article argues that default visitation practices involving children placed in the foster system function as a site of social control and facilitate the permanent destruction of the parent-child relationship. That is, the state temporarily removes children from their parents' care and then, under the auspices of child safety, thwarts the family's ability to reunify by co-opting the tools of visitation to test, surveil, and legally sever the family.

This Article concludes by proposing model legislation that redresses the harm inflicted upon families through the application of visitation laws across the country. In doing so, the Article recommends that states pursue two parallel, but

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oft-considered contrary, paths forward: fortify familial rights to visitation and obviate the need for visitation by shrinking the number of children unnecessarily separated from their parents.

INTRODUCTION

[B]oth children and prisoners are strip searched. Both are separated from everything and everyone they know and love. Both eat what they are served. Both have set visit times on set visit days. Both have oversight during the visit.

—Joyce McMillan[1]

The State of California removed T.J. from his parents' care and placed him in the foster system when he was nine days old.[2] California alleged that T.J.'s parents, both diagnosed with developmental disabilities, could not

1. Doin' the Work: Frontline Stories of Social Change, *Abolish the Family Policing System*, at 08:29 (Mar. 14, 2022), https://dointhework.podbean.com/e/abolish-the-family-policing-system-child-welfare-joyce-mcmillan-victoria-msw/ [https://perma.cc/YRK8-DBNP] (on file with the North Carolina Law Review) (discussing the parallels to prison and carceral systems when explaining the use of the term "family policing system" instead of "child welfare system").

2. Tracy J. v. Super. Ct., 136 Cal. Rptr. 3d 505, 508 (Cal. Ct. App. 2012).

provide him with adequate care.[3] After removing this newborn from his parents, the state agency provided the separated family with only one visit per week.[4] The agency further mandated that the visits be supervised.[5] At a court hearing ten months later, the visitation supervisor reported that T.J.'s parents demonstrated a parental role with T.J., responded to his verbal and nonverbal

3. *Id.* Despite evidence that parents with intellectual and developmental disabilities ("IDD") can and do safely take care of their children, such parents are up to eighty percent more likely to face the removal of children from their homes. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 16 (2015), https://www.ncd.gov/assets/uploads/reports/2012/ncd-rocking-the-cradle.pdf [https://perma.cc/UK3N-PSXC]. Following the child's removal, parents with IDD are more than three times as likely to have their parental rights terminated than parents without a disability. Tracie LaLiberte, Elizabeth Lightfoot, Shweta Mishra & Kristine Piescher, *Parental Disability and Termination of Parental Rights in Child Welfare*, MINN-LINK, no. 12, Spring 2015, at 1, 5, https://drive.google.com/file/d/1JjCeER0b_Erba4GMDBiObOt3YSA-fq-6/view?usp=drive_link [https://perma.cc/8EL8-WE2B]. Scholars have written widely on the disproportionate harm experienced by parents with disabilities and their children as a result of the laws and practices governing child neglect and abuse. *See, e.g.*, Sarah H. Lorr, *Disabling Families*, 76 STAN. L. REV. 1255, 1255 (2024) [hereinafter Lorr, *Disabling Families*] (arguing that "the family regulation system not only discriminates against parents with disabilities but actually produces disability"); Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1316 (2022) [hereinafter Lorr, *Unaccommodated*] (analyzing how the Americans with Disabilities Act fails to protect parents with disabilities in the family regulation system); Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423, 430 (2023) (examining the "facially discriminatory state laws that list parental disability as grounds for termination of parental rights"); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37 (2022) (asserting that "the family policing system functions as an unjust social institution for disabled parents and their children and, as such, . . . must be abolish[ed] . . . and replac[ed] with non-punitive supports . . . for families"); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 129 (2016) (exploring how family regulation "scholarship, advocacy, and policymaking can be better informed by social science"); Charisa Smith, *Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges*, 39 LAW & PSYCH. REV. 205 (2015) (utilizing "theoretical framework to examine how state termination of parental right statutes . . . unfairly deprive mentally challenged parents of due process").

4. *Tracy J.*, 136 Cal. Rptr. 3d at 509. For simplicity, I refer to "state agency" throughout this Article. Different jurisdictions use different names, such as departments of social services, children's services, child and family services, etc. For example, the New York City child protective body is the Administration for Children's Services ("ACS"), which covers all five boroughs. *See About ACS*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., http://www1.nyc.gov/site/acs/about/about.page [https://perma.cc/W33D-6A3R]. In the rest of the state, the child protective bodies are individual county departments of social services. *See Local Departments of Social Services*, N.Y. ST. OFF. OF CHILD. & FAM. SERVS., http://ocfs.ny.gov/main/localdss.asp [https://perma.cc/NA7A-6RKH (staff-uploaded archive)].

5. *Tracy J.*, 136 Cal. Rptr 3d at 509. In her testimony before the Washington State Legislature, one parent described supervised visitation as "the small box that [she] went into"; and how she sat "in that box with my child while someone observed, took notes, looked at us, and it was probably the most unsettling, unnatural, and stressful event." *Hearing Before the Wash. House of Representatives Child., Youth & Fams. Comm.: Pub. Hearing on H.B. 1194*, 2021 Reg. Sess., at 45:02 (Wash. Jan. 20, 2021) (Statement of Shrounda Selivanoff) [hereinafter *Hearing 1194*], https://tvw.org/video/house-children-youth-families-committee-2021011327/?eventID=2021011327 [https://perma.cc/CCP3-6JWQ] (on file with the North Carolina Law Review).

signs, put his needs ahead of their own, and appropriately relied on each other to care for him.[6] Despite this, the state agency never exercised its discretion to expand visitation.[7]

Instead, T.J. and his parents continued to receive one supervised visit per week for *over two years*.[8] The state agency never raised any safety concerns regarding the parents' interactions with T.J. during these visits.[9] To the contrary, the record contained evidence that both parents actively participated in family reunification services and functioned well as a team.[10] T.J., described by the state agency as a happy and active child, "liked to follow his father around" at visits.[11]

Nonetheless, the state agency asked the court to schedule a hearing to terminate T.J.'s parents' parental rights.[12] The court granted the state agency's request and noted that T.J.'s parents were "moving in the right direction" but "the time [had] run out."[13] Specifically, the court found it was unlikely T.J.'s parents would be able to care for T.J. "[i]n view of the highly structured, supervised visitation."[14] That is, the *de minimis* contact the state agency provided

6. *Tracy J.*, 136 Cal. Rptr. 3d at 509, 513. When the physical limitations of T.J.'s mother, who had Prader-Willi syndrome, affected her ability to change T.J.'s diaper or take him out of the high chair, she relied upon T.J.'s father for assistance. *See id.* at 508–09.

7. At the hearing ten months after the filing of the petition, the court "authorized the [state] [a]gency to implement unsupervised visits with notice to [T.J.'s] counsel, and overnights and a 60-day home visit with the advance concurrence of [T.J.'s] counsel." *Id.* at 509.

8. According to the court opinion, T.J. was born in January 2010. *Id.* at 508. The State filed the petition of child maltreatment nine days after his birth. *Id.* The trial court removed T.J. from his parents' custody, and the State provided the parents with one supervised visit per week. *Id.* at 508–09. Following a hearing on July 25–26, 2011, the trial court terminated reunification services and scheduled a hearing on the termination of parental rights. *Id.* The parents petitioned for review of the trial court's order and received a stay of the hearing to terminate parental rights. *Id.* at 511. On January 26, 2012, the appellate court ordered, among other things, the trial court to vacate both its finding that reasonable services were provided to the parents and its order terminating reunification services. *Id.* at 508, 515. The appellate court additionally directed the trial court to order the state agency to expand the parents' visitation with T.J., "as appropriate." *Id.* at 515. It is unknown whether and, if so, when the state agency expanded visitation.

9. *Id.* at 510. The caseworker could only describe one incident that *may* have implicated T.J.'s safety—when T.J., who was learning to walk, fell and bumped his head. *Id.* T.J.'s father responded to the fall by picking up T.J. in a "very nurturing, very loving," manner, wiping away his tears and, following the advice of the caseworker, applying ice to T.J.'s head. *Id.*

10. The court noted T.J.'s father was "loving and caring[,]" and T.J.'s mother, who had physical challenges, was "articulate and observant." *Id.* The court found that, together, their "strengths and weaknesses balanced each other, . . . they functioned well as a team." *Id.*

11. *Id.* at 510.

12. The state agency told the court that T.J.'s parents did not have the ability to safely parent. *Id.* at 509. A caseworker reported she "would be uncomfortable" leaving T.J. alone with his parents because she did not know how his parents would respond in an emergency, even though she acknowledged the parents knew how to call for help. *Id.* at 510.

13. *Id.* at 510–11; *see infra* Part II (discussing the timeline imposed by federal law in family regulation cases).

14. *Tracy J.*, 136 Cal. Rptr. 3d at 511.

to this separated family served as evidence of T.J.'s parents inability to parent, upon which the court relied.

This result should be unimaginable. And it would have been had the court ensured that the parents and child kept significantly closer ties—including longer and more frequent visits—throughout the foster placement period. Sadly, however, this account is anything but unusual.[15]

Visitation is rarely the subject of study by those interested in civil child neglect and abuse proceedings in the United States.[16] And yet, as T.J.'s case shows, state control of contact between parents and their children placed in the foster system not only curtails a family's ability to *be* a family, but also, when implemented in a restrictive way, forestalls a parent's ability to perform the very act that is required of them. Parents face a perpetual catch-22: the system demands performance of the ability to parent but denies the opportunity to perform.

This Article is the first to provide an in-depth analysis of visitation in the family regulation system.[17] The term "visitation" in this Article refers to the time spent between parents and their children during a court-imposed

15. The U.S. Department of Health and Human Services states that "[w]hat the field most often regards as 'visitation' and 'visitation plans' seldom fulfills the needs that parents and children have for meaningful and nurturing time together." Memorandum from Child.'s Bureau, U.S. Dep't of Health & Hum. Servs. to State, Tribal and Territorial Agencies Administering or Supervising the Administration of Titles IV-E & IV-B of the Social Security Act, and State and Tribal Court Improvement Programs 2 (Feb. 5, 2020) [hereinafter HHS Memo].

16. This Article refers to "neglect and abuse" because the vast majority of cases involve allegations of neglect, not abuse. As noted by Professor Josh Gupta-Kagan, this sequence "flips the order of those terms as they are most commonly used." *See* Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 233 n.83 (2022). Scholarship on state control of contact between parents and their children in the foster system has focused almost exclusively on incarcerated parents. *See, e.g.*, Brent Pattison, *Mama Tried: Shifting Thinking (and Practice) in Child Welfare Cases When a Parent Is Incarcerated*, 27 AM. U. J. GENDER SOC. POL'Y & L. 495, 496–500 (2019); Courtney Serrato, *How Reasonable Are Reasonable Efforts for the Children of Incarcerated Parents?*, 46 GOLDEN GATE U. L. REV. 177, 177–80 (2016); Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 175 (2012); Megan McMillen, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1811–12 (2012); Dana Harrington Conner, *Do No Harm: An Analysis of the Legal and Social Consequences of Child Visitation Determinations for Incarcerated Perpetrators of Extreme Acts of Violence Against Women*, 17 COLUM. J. GENDER & L. 163, 163–64 (2008).

17. This Article will use the phrase "family regulation system" to describe what is often called the child welfare system. *See* Dorothy Roberts, Opinion, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/S6DJ-FLFR] (describing the "misnamed 'child welfare system'" as "more accurately referred to as the 'family regulation system'"); *see also* Emma Ruth, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/Y5Q9-Q8EC]; Angela Olivia Burton & Joyce McMillan, *Special Issue: Race, Racism and Child Welfare: How Judges Can Use Their Discretion to Combat Anti-Black Racism in the United States Family Policing System*, 61 FAM. CT. REV. 264, 266–83 (2023).

separation. It also references the laws that are used to determine the frequency, duration, location, and level of supervision between parents and their separated children.[18]

This Article reveals how common and routine visitation practices involving children placed in the foster system facilitate the permanent destruction of the parent-child relationship. That is, the State temporarily removes children from their parents' care and then, under the auspices of child safety, thwarts the family's ability to reunify by weaponizing the tools of visitation to legally sever the family. Across the country, in virtually all jurisdictions, overly restrictive visitation between parents and their children placed in the foster system is inadequate, unnecessary, and arguably unconstitutional.[19] Families in some jurisdictions receive as little as two hours every other week of contact with each other.[20] Too frequently, the site of these visits is a sterile, crowded room where parents and their child are observed by a state employee taking notes.[21] Separated families wait weeks, sometimes months, for the state to schedule the first visit.[22] Parents and their children often do not know when they will next see each other. Minimal contact occurs

18. I use the term "visitation" because it is the term used most often in family regulation law, policy, and research. However, this term is not without criticism. In 2016, the National Council of Juvenile and Family Court Judges proclaimed, "[c]ourts should discourage the use of the term 'visitation' which does not communicate the intimacy and importance of the parent/child/sibling relationship." SOPHIE I. GATOWSKI, NANCY B. MILLER, STEPHEN M. RUBIN, PATRICIA ESCHER & CANDICE MAZE, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 85 (2016), https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf [https://perma.cc/VH4A-55AM]. Retired family court judge Leonard Edwards has criticized the use of the word "visitation," as it conveys "a visit to a jail or other location where a person is held against his or her will." Leonard Edwards, *Foreword* to KAREN WORTHINGTON, JUD. COUNCIL/ADMIN. OFF. OF CTS. DIV. OF CHILD. & SUPREME CT. OF GA. COMM. JUST. FOR CHILD., GEORGIA FAMILY TIME PRACTICE GUIDE 1 (2019) [hereinafter Edwards, *Foreword*]. Indeed, the U.S. Department of Health and Human Services asserts that viewing parent and child contacts during foster placement as "family time" rather than "visits" reflects "the critical importance of the length and quality of time that children spend with their parents." HHS Memo, *supra* note 15, at 2.

19. *See infra* Section III.A–D.

20. *See infra* Section III.B.

21. Professor Vivek Sankaran has commented that most judges and attorneys "just haven't seen what these facilities are like." *Visiting Hours*, RISE MAG., (Dec. 17, 2020), https://www.risemagazine.org/2020/12/visiting-hours [https://perma.cc/X2BB-GVFN] (interview of Professor Vivek Sankaran); *see also* Sarah Katz & April Lee, *Lies My Child Welfare System Has Told Me: The Critical Importance of Centering Families' Voices in Family Policing Legal Advocacy*, 62 FAM. CT. REV. 790, 797 (2024) ("Visits bring on a new level of terror. I was put into this expansive room with other families. I walked through the metal detectors with armed guards on the other side. Your every move would be watched, the way you speak, interact, feed, and care for your children.").

22. *E.g.*, *Hearing 1194*, *supra* note 5, at 39:54 (Statement of Kristina Jorgensen) ("I have worked with countless parents that have gone weeks, sometimes months, without seeing their children after removal.").

by default and without regard to the needs of the child or the family's circumstances.[23]

Systemic actors—namely, the state agency, its attorneys, and the judiciary—utilize visitation not simply for its designed purpose, but also to test, surveil, and punish the family. Parents must prove they are compliant and worthy of contact with their child.[24] The State criticizes parents at visits for the way they sit,[25] how they speak,[26] and even for the food they bring their children.[27] Agencies commonly cancel visitation if a parent arrives late, even if the lateness was due to work, lack of transportation, or being developmentally disabled yet required to travel "by bus, ferry, and subway" to see their child.[28] Agencies have refused to schedule a next visit for another month or two as a sanction for being late.[29]

23. *See infra* Section III.B.

24. *See infra* Section III.C.

25. *See, e.g.*, Hayley Lichterman (@HKLichterman), X (May 25, 2022, 9:55 AM), https://x.com/HKLichterman/status/1529461277009096705?s=20 [https://perma.cc/AT2D-42LG] ("Yesterday a Mother was lounging on the couch cuddling with her toddler at the DSS visit. The worker said 'sit up this isn't your home.'"); Joyce McMillan (@JMacForFamilies), X (May 25, 2022, 10:20 AM), https://x.com/JMacForFamilies/status/1529467424977952768 [https://perma.cc/UKC2-2CMC] ("I will never forget my visits being suspended for weeks b/c I fell asleep in the lazy boy chair at my visit with my 6 month old sleeping on my chest.").

26. A Nebraska trial judge threatened to suspend a father's visitation if he did not stop speaking to his daughter in Spanish. Associated Press, *Court Orders Father to Speak in English*, N.Y. TIMES (Oct. 15, 2003), https://www.nytimes.com/2003/10/15/national/court-orders-father-to-speak-in-english.html [https://perma.cc/8TW2-QQP8 (staff-uploaded, dark archive)]. In 1995, a Texas judge warned a Latina mother that she would lose custody of her five-year-old daughter if she continued to speak to her in Spanish. Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES (Aug. 30, 1995), https://www.nytimes.com/1995/08/30/us/mother-scolded-by-judge-for-speaking-in-spanish.html [https://perma.cc/8B8S-BP25 (staff-uploaded, dark archive)]. The judge stated that it was not in the child's "best interest to be ignorant," since she will "only hear English" and added that, by speaking to her in Spanish, the mother was "relegating her to the position of a housemaid." *Id.*

27. *See, e.g.*, Daniel Moritz-Rabson, *'Never Designed to Help': How New York's 'Child Welfare' System Preys on Families*, APPEAL (May 15, 2023), https://theappeal.org/acs-new-york-city-administration-for-childrens-services/ [https://perma.cc/R837-KJBV] (describing one parent's supervised visits with her daughter, where the state agency "would be there to observe, often quipping about the food she was allowing her child to eat"); *see also* Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 689 (2014) (discussing the state's efforts to terminate the parental rights of one Latina mother, claiming the child's diet was "too heavy in dairy" because "his parents fed him milk, tortillas, sopas, eggs, and beans").

28. *In re* Jose F., 2020 WL 8262246, at *5 (N.Y. Fam. Ct. Dec. 21, 2020) (unpublished table decision) (illustrating where the caseworker acknowledged, when questioned, that she never attempted to meet with the parents to determine whether any faster, more reliable, or less complex option existed).

29. Testifying before the Washington legislature on the "countless parents" she worked with who lost time with their children while "no evidence exist[ed] that there [was] a safety threat to their child," social worker Kristina Jorgensen stated: "[N]o one can make up the time a family misses together . . . You can't make up a child's first day of school, their birthday, a holiday, or being there for your child when they are having a bad day." *Hearing 1194*, *supra* note 5, at 38:11 (statement of Kristina Jorgensen).

Legal scholarship is reckoning with the centrality of family separation to child protection in the United States. Such scholarship confronts anew how the family regulation system, with the law's imprimatur, creates and reinforces understandings of which families can be together.[30] Given the current moment—with the family regulation system in a legitimacy crisis amid widespread calls for abolition[31]—it is more important than ever to develop the fullest possible understanding of the state's relationship to vulnerable families. The costs of widespread visitation practices have not yet been meaningfully addressed in scholarship.

This Article makes three contributions. The first is to expose how visitation imposes underappreciated forms of social control upon families ensnared by the family regulation system. Building upon the work of scholars examining the state's blame of individuals to distract from structural failures,[32] this Article breaks new ground by analyzing visitation as a mechanism of social control and providing a specific context to illustrate how that social control takes

30. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at vii–ix (2002) [hereinafter ROBERTS, SHATTERED BONDS]; DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 35 (2022) [hereinafter ROBERTS, TORN APART]; Lorr, *Disabling Families*, *supra* note 3, at 1265; Lorr, *Unaccommodated*, *supra* note 3, at 1319; S. Lisa Washington, *Pathology Logics*, 117 NW. L. REV. 1523, 1523 (2023) [hereinafter Washington, *Pathology Logics*]; S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1097–98 (2022) [hereinafter Washington, *Survived and Coerced*]; Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 939–43 (2023); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 525–27 (2019) [hereinafter Trivedi, *The Harm of Child Removal*]. Scholars have also critiqued the lack of procedural and substantive protection afforded to parents and families in the system. *See, e.g.*, Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485, 1485–86 (2023); Anna Arons, *Family Regulation's Consent Problem*, 125 COLUM. L. REV. (forthcoming 2025) (manuscript at 22); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1057–58 (2023); Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 841 (2020) [hereinafter Gupta-Kagan, *America's Hidden*]; Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 13–15 (2010).

31. *See generally* ROBERTS, TORN APART, *supra* note 30 (calling for abolition of the family regulation system); JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES (2023) (examining the failure of family court and calling for its abolition) [hereinafter SPINAK, END OF FAMILY COURT]; ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION (2023) (calling for the abolition of the child welfare system due to the harm it causes Black families); Burton & McMillan, *supra* note 17, at 266 ("[W]e join with many advocates in calling for an end to family policing and for abolishing the current 'child protective services' ('CPS') system of reporting, investigation, prosecution, and 'treatment' of families as the primary policy response to structurally created racialized poverty and disadvantage.").

32. *E.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 129 (2017) ("[T]he state intervenes in poor families in the way that it does dramatically, harshly, completely—because the moral construction of poverty counsels that rupturing families while trying to fix bad parents is the proper course of action."); Washington, *Pathology Logics*, *supra* note 30, at 1531 (defining the pathology logics in the family regulation system "that focus on or produce individual 'deficits' while rendering the structural conditions of poverty and racism that underlie family safety invisible").

place. This analysis uncovers that default visitation practices conflict with social science research, higher court decisions, and the constitutional rights of parents and children.

Second, this Article contributes to the conversation about the endemic failure of family courts to live up to constitutional norms—and the effect that failure has on perpetuating family separation and generational trauma.[33] This failure has an undeniable racial and class component, as parents accused of civil neglect and abuse are disproportionately Black, Latinx, and Indigenous, and poor or working class.[34] Visitation is the process by which the state determines precisely how much liberty it will grant to a parent and their child. Given the magnitude of the state's power in this context and the fundamental rights at stake, one would expect that family regulation courts would assiduously protect the right to visitation, as it is protected in private custody cases.[35] As this Article finds, however, such protections are not routinely provided for in the family regulation system.

Finally, this Article concludes with recommended model legislation that redresses the harms inflicted by widespread visitation practices in a system ostensibly designed to promote the well-being of children. Fortifying the rights of parents and children to maintain and strengthen their relationship would herald a reduction in family separation and a rise in family reunification. The Article argues that states should pursue this model legislation while also meeting the needs of all families outside a system of punishment. Thus, the solution must pursue two parallel paths forward: strengthen familial rights to visitation and obviate the need for visitation by shrinking the number of children unnecessarily separated from their parents every year.

This Article proceeds in four parts. Part I offers the background necessary to understand the importance of visitation between parents and their children in the foster system. Part II discusses the legal framework that governs

33. Halimah Washington described her family's intergenerational experience with the family regulation system in her 2021 testimony to the New York State Assembly:

> I am a Black Mama from New York City who is directly impacted by the family policing system with involvement going back multiple generations. My experience with the family policing system speaks to how it stays in people's lives for multiple generations, never helping, but continuing to cause harm and trauma.

Halimah Washington's Testimony to NY State Assembly, RISE MAG. (Oct. 25, 2021), https://www.risemagazine.org/2021/10/halimahs-testimony-to-nys-assembly/ [https://perma.cc/NT3Z-5KVV]; *see also* Shereen A. White, *We Must Demand the Recognition and Protection of the Sanctity of Black Families*, CHILD.'S RTS. (June 2, 2023), https://www.childrensrights.org/news-voices/we-must-demand-the-sanctity-of-black-families [https://perma.cc/XUG2-G5XH] ("We're generational products of the family policing system. So, they didn't just start with my mother and my aunt. They took my mother's kids, they took my dad's kids, they've taken some of my sister's kids.").

34. *See infra* Section I.B.

35. *See infra* Section III.A.

visitation and underpins the constitutional right to family integrity. It creates a taxonomy of state law and provides context on the ways these vague, indiscriminate laws can be used as a mechanism of social control. Part III advances the central claim of this Article: widespread, default visitation practices involving children in the foster system thwart the family's ability to reunify and facilitate the destruction of the parent-child relationship. It lays out the judiciary's reluctance to rigorously oversee the state agency, the state agency's unfettered discretion to determine and implement visitation, and the resulting implications. Finally, Part IV contends with where we go from here and sets out model legislation as a starting point for the path forward.

I. WHY VISITATION MATTERS

The state separates approximately 250,000 children from their parents every year.[36] When the separation occurs, numerous questions arise about what kind of ongoing contact the child and parent will have with each other: when, where, and how will they visit? This part briefly summarizes the social science research, discusses visitation as a unique form of risk assessment, and describes the lack of data collection on visitation. In doing so, it contextualizes both the importance of visitation to families separated by the state and visitation's centrality to the legal framework of family reunification.

A. *Overview of Social Science Research*

Visitation in the family regulation system is largely predicated on three overarching assumptions. First, minimal, supervised visitation is safer for the child.[37] Second, visitation should start slowly and build up.[38] Third, expanding

36. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf [https://perma.cc/XZG2-57RR]. However, scholars estimate that an even larger number of children are separated from their parents pursuant to CPS "safety plans" that skirt court jurisdiction. *See* Gupta-Kagan, *America's Hidden*, *supra* note 30, at 847–48.

37. *See, e.g.*, *In re* Bree W., 98 A.D.3d. 522, 523 (2012) (explaining that the "safer course" was to "continue with supervised visitation pending a full [adjudicatory] hearing"); *In re* Aliah M.J.-N. (Candace J.), 42 N.Y.S.3d 828 (2016) (explaining where "it was an improvident exercise of the Family Court to direct that the mother shall have unsupervised visitation" prior to the adjudicatory hearing); *see also* IND. DEP'T OF CHILD SERVS., INDIANA CHILD WELFARE POLICY MANUAL at ch. 8, § C Tool: Supervision of Visit (2024), https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf [https://perma.cc/PBK3-LTCD] (stating "[i]nitially, most visits are fully supervised.").

38. One caseworker stated, "the visits are going to be less in the beginning . . . then they will increase depending on how well the visits go." Lina M. Muñoz, Preserving the Bond: Child Welfare Professionals' Perspectives on the Opportunities and Challenges of Parent-Child Visitation 81 (Aug. 2013) (Ph.D. dissertation, Loyola University Chicago) (on file with the North Carolina Law Review); *see also* THE CTR. FOR THE STUDY OF SOC. POL'Y, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN'S CHILD WELFARE SYSTEM 13 (2009),

visitation depends upon a parent's "compliance" with their service plan.[39] None of these assumptions are supported by social science. Quite the opposite. This section briefly describes the social science research, which establishes the critical need for frequent, meaningful visitation. Such visitation, moreover, should occur in the least restrictive setting in accordance with the child's safety and should never be earned nor dependent on perceived negative responses from a child.

1. The Power of Consistent, Frequent Visitation

Relying upon social science research, the U.S. Department of Health and Human Services ("HHS") issued an information memorandum on research, best practices, and recommendations for visitation between parents and their children placed in the foster system. Per HHS, consistent, frequent visitation increases the likelihood that family reunification will be maintained and sustained and decreases the length of time children spend in the foster system.[40] The National Council of Juvenile and Family Court Judges states that infants and toddlers can benefit from daily visitation.[41] Some state policies concede that children placed in the foster system "should have daily or near daily" contact with their families.[42] High frequency visitation, which HHS only defines by what it is not,[43] correlates with a myriad of positive outcomes for children, including better adjustment, lower levels of depression, and stronger attachment to their parents.[44] Children benefit from stronger attachment to their parents even when the parent and child will not reunify.[45] One study of children aged six to seventeen found that these children had less internalizing, externalizing, and total behavior problems when experiencing daily contact with their mothers.[46]

The American Association of Pediatrics has explained that family separation "can cause irreparable harm, disrupting a child's brain architecture

https://ocfs.ny.gov/main/recc/presentations/Race-Equity-Review-Michigan-2009.pdf [https://perma.cc/HA43-R98R (staff-uploaded archive)] ("During Matthew's first month in protective custody, he had no visits with his mother. It was standard practice for visits between children and parents to be suspended upon the filing of a termination of parental rights (TPR) petition.").

39. *See infra* Section III.C.

40. HHS Memo, *supra* note 15, at 3–5.

41. GATOWSKI ET AL., *supra* note 18, at 88.

42. *See*, *e.g.*, STATE OF MICH. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S FOSTER CARE MANUAL, FOM 722-06I, MAINTAINING CONNECTIONS: PARENTING TIME, SIBLING VISITATION, AND CONTACT 1 (2022).

43. HHS Memo, *supra* note 15, at 2.

44. PARTNERS FOR OUR CHILD., FAMILY VISITATION IN THE CHILD WELFARE SYSTEM 2 (2017), https://partnersforourchildren.org/wp-content/uploads/2017/02/POCFamilyVisitationBrief-FINAL.pdf [https://perma.cc/3JAW-AEW9].

45. *Id.*

46. Lenore Mcwey & Ming Cui, *Parent-Child Contact for Youth in Foster Care: Research to Inform Practice*, 66 FAM. RELS. 684, 684 (2017).

and affecting his or her short- and long-term health."[47] For children, as soon as a family separation occurs, it feels permanent.[48] HHS states that children are at their "most traumatized stage" immediately following separation from a parent.[49] Children are often scared, confused, and have incomplete understandings of what happened to their families, why they are not with their parents, and what their futures hold.[50] Delayed contact after a family separation exacerbates children's stress responses and compounds trauma.[51] The trauma, even on newborn babies, is profound and can last into adulthood.[52] Even short-term separation can interfere with a child's sense of safety, emotional regulation, social engagement, and learning capacity.[53] Further, compared to children who face the risk of removal from their parents' care, but ultimately remain in their parents' care, children who are actually removed from their parents' care

47. Press Release, Colleen Kraft, Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf [https://perma.cc/X43J-938A]; *see also* William Wan, *What Separation from Parents Does to Children: 'The Effect is Catastrophic,'* WASH. POST (June 18, 2018, 6:15 PM), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/S7N3-Q2S7 (staff-uploaded, dark archive)]; Trivedi, *The Harm of Child Removal*, *supra* note 30, at 527–34 (explaining the family regulation system's frequent underestimating and undervaluing of the emotional and psychological harms experienced by many children removed from their parents).

48. HHS Memo, *supra* note 15, at 1–2.

49. *Id.* at 2.

50. *Id.*

51. *Id.*; *see also* Press Release, Kraft, *supra* note 47 (describing family separation as "prolonged exposure to serious stress—known as toxic stress—[that] can carry lifelong consequences for children").

52. Antoinette Robinson & Sonia Diaz, *Starting Strong – Parent-Child Therapy Helps Parents and Children Build a Lasting Bond*, RISE MAG. (Sept. 1, 2015), https://www.risemagazine.org/2015/09/starting-strong/ [https://perma.cc/F8VY-8833] (interview with Wendie Klapper) ("[W]e know from years of research that if parents and children are able to develop an emotionally supportive relationship early on, it helps both the child and parent continue to build a healthy relationship throughout the child's life."); Kimberly Howard, Anne Martin, Lisa J. Berlin & Jeanne Brooks-Gunn, *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5, 5 (2011); Robert Winston & Rebecca Chicot, *The Importance of Early Bonding on the Long-Term Mental Health and Resilience of Children*, 8 LONDON J. PRIMARY CARE 12, 12–14 (2016); *see also Complex Trauma*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma [https://perma.cc/7FMF-HQXN] ("Children whose families and homes do not provide consistent safety, comfort, and protection may develop ways of coping that allow them to survive and function day to day."); Emma S. Ketteringham, Sarah Cremer & Caitlin Becker, *Healthy Mother, Heathy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline*," 20 CUNY L. REV. 77, 80 (2016).

53. *See* Howard et al., *supra* note 52, at 8 (studying 2,080 families and concluding that separation can "result in distress for a young child who lacks the cognitive abilities to understand the continuity of maternal availability"); *see also* Trivedi, *The Harm of Child Removal*, *supra* note 30, at 531–34; Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016) ("[R]emoving children—even abused and neglected children—from the custody of their parents harms them emotionally, developmentally, and socially.").

experience higher likelihoods of criminal legal involvement, substance abuse, dropping out of school, or becoming homeless.[54]

There is no shortage of social science espousing the importance of consistent, frequent visitation between parents and their children placed in foster care.[55] According to the American Academy of Pediatrics, "[w]eekly or other sporadic 'visits' stretch the bounds of a young child's sense of time and do not allow for a psychologically meaningful relationship . . . . For parent-child visits to be beneficial, they should be frequent and long enough to enhance the parent-child relationship."[56] Research shows that parents with lived experience in the family regulation system report that visitation with their children is "motivating" and "help[s] them stay focused on successfully completing treatment or more generally meeting the conditions of case plans."[57]

2. The Importance of Visitation in the Least Restrictive Setting

Social science literature also conveys the magnitude of meaningful visitation. That is, consistent, frequent visitation alone is not enough, but rather "[t]he quality of time a parent spends with his or her child is critical."[58] This section focuses on two crucial components of visitation that affect the quality of the time a parent and child spend together: who is present and where the visit occurs.[59]

As this Article will demonstrate, whether visitation must be supervised is often the most contentious aspect of a family separation case. It is trying for a family to "maintain their connections when someone is sitting nearby, watching every move and taking notes about every interaction."[60] According to HHS, "[r]esearch shows that supervised family time can and often does affect the comfort levels of parents and children and can inhibit the ability of a parent or child to interact freely."[61] HHS explicitly notes that the determination that a

54. Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007).

55. *See, e.g.*, Ruth Chambers, Jo Brocato, Maryam Fatemi & Angel Rodriguez, *An Innovative Child Welfare Pilot Initiative: Results and Outcomes*, 70 CHILD. & YOUTH SERVS. REV. 143, 145 (2016) (finding that children and youth who have regular visits with their families are more likely to reunify).

56. Comm. on Early Childhood, Adoption & Dependent Care, Am. Acad. Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1148 (2000).

57. HHS Memo, *supra* note 15, at 9; *see also* MARGARET SMARIGA, AM. BAR ASSOC., VISITATION WITH INFANTS AND TODDLERS IN FOSTER CARE: WHAT JUDGES AND ATTORNEYS NEED TO KNOW 6 (2007) (noting frequent family time "keeps hope alive for the parent(s) and enhances parents' motivation to change").

58. HHS Memo, *supra* note 15, at 5.

59. *Id.*

60. Mimi Laver, *Family Time/Visitation: Road to Safe Reunification*, AM. BAR ASSOC. (Mar. 1, 2017), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/family-time-visitation--road-to-safe-reunification/ [https://perma.cc/82MC-3S2R (staff-uploaded archive)].

61. HHS Memo, *supra* note 15, at 5.

child must be removed from their home and placed in the foster system does *not* "automatically mean[] visitation must be supervised."[62] A child's placement in the foster system "may be necessary for a variety of reasons; however, that does not mean it is unsafe for parents and children to spend time together without supervision."[63] To be sure, the National Council of Juvenile and Family Court Judges has stated since 2011 that visitation "should be liberal and presumed unsupervised unless there is a demonstrated safety risk to the child."[64] HHS recommends that judges "order unsupervised" visitation "unless specifically contraindicated by safety threats to the child" and, similarly, instructs state agencies that unsupervised visitation "should be arranged absent identified, immediate danger of harm to the child."[65]

When visitation must be supervised, the next inquiry impacting the quality of the visit becomes whether the supervision must be by the state agency. Any adult, including friends, extended family, neighbors, or clergy, can serve as a visitation supervisor. In fact, "where supervised visitation may be necessary," HHS recommends that state agencies identify "trusted adults the parents may know that can help" supervise.[66] The emphasis on supervision by nonstate agency employees is because research recognizes that the presence of the same state agency that separated the family diminishes the quality of the time spent between both parents and their children placed in the foster system. Namely, "[p]arents with lived experience in child welfare commonly report that the presence of a government employee or private social worker with decision-making authority over the future of their families can affect the quality of the time a parent spends with his or her child."[67] For example, "[p]arents report that being watched by someone taking notes during visits makes them

62. *Id.*

63. *Id.*

64. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, KEY PRINCIPLES FOR PERMANENCY PLANNING FOR CHILDREN 2 (2011).

65. HHS Memo, *supra* note 15, at 15.

66. *Id.* at 16.

67. *Id.* at 5; *see also* HALIMAH WASHINGTON, NAASHIA B., YVONNE SMITH, SHAMARA KELLY, MELISSA LANDRAU, IMANI WORTHY, ERIN MARKMAN, IRENE LINARES, TRACY SERDJENIAN & NORA MCCARTHY, RISE, AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS' VISION FOR INVESTING IN COMMUNITY CARE 16 (2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf [https://perma.cc/PSG9-SPWM] (reporting research participants "could not have been clearer that they wanted support and resources to come from people, networks and organizations outside of [CPS], an agency they don't trust to provide family support"); S. Lisa Washington, *Weaponizing Fear*, 132 YALE L.J.F. 163, 163 (2022) ("Fear of state supervision and family separation takes a tremendous toll on impacted families. State actors weaponize this fear by leveraging . . . a structural environment that induces, benefits from, and relies on fear, making it easier to control families.").

uncomfortable and less likely to interact with their children for fear of making a mistake."[68]

Finally, the location of the visit also shapes the quality of the family's time together. An "ideal visitation context would include an emotionally supportive and enriching environment."[69] HHS encourages visitation "in the family's home" or "in normal parenting activities" that broadly allow for parental participation in daily experiences of their child's life, such as sharing meals, medical appointments, school events, and recreational activities.[70] HHS cites the value of a "nonthreatening space for families to spend time together."[71] Because visitation at state agencies is often in space that is "not family-friendly" and lacks "toys, books, games, or crafts for all ages or clean floor space,"[72] facilitating parent-child visitation at state agencies should "be the final choice."[73]

3. Visitation as a Right Versus a Reward to Be Earned

Another critical component to the implementation of visitation regards whether it is considered to be a right of the family or a reward that a parent must earn. While Part III will demonstrate the extent to which state agencies and the judiciary treat visitation as a reward that must be earned, social science remains explicitly clear that visitation should never be used as a reward or punishment due to its utmost significance in the lives of separated families.[74] Policy and guidance on best practice at both the federal and state level urge visitation be untethered to a parent's "compliance" with their state-imposed

68. Marty Beyer, *Visit Coaching: Building on Family Strengths to Meet Children's Needs*, 59 JUV. & FAM. CT. J. 47, 48 (2008) [hereinafter Beyer, *Visit Coaching*].

69. Lenore M. McWey, Alan Acock & Breanne E. Porter, *The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care*, 32 CHILD. & YOUTH SERVS. REV. 1338, 1339 (2010).

70. HHS Memo, *supra* note 15, at 2–3; *see also* IRVING HARRIS FOUND. PRO. DEV. NETWORK, HOW TO CREATE MEANINGFUL FAMILY TIME WITH YOUNG CHILDREN 13 (2020), https://www.irvingharrisfdn.org/wp-content/uploads/2020/09/4_Meaningful-Family-Time_case-worker_FNL_DC.pdf [https://perma.cc/662C-E2EJ] (providing examples of family time that will strengthen the parent-child relationship, like "cuddling and reading together . . . feeding or bathing the child . . . any family or cultural rituals like hair styling, prayers, or birthday songs").

71. HHS Memo, *supra* note 15, at 11.

72. Beyer, *Visit Coaching*, *supra* note 68, at 48.

73. ILL. DEPT. OF CHILD. & FAM. SERVS., PROCS. 301, PLACEMENT AND VISITATION SERVICES § 301.210(h) (2018).

74. *See, e.g.*, TEX. DEPT. OF FAM. & PROTECTIVE SERVS., CHILD AND FAMILY VISITATION BEST PRACTICE GUIDE 1 (2015), https://www.dfps.texas.gov/handbooks/CPS/Resource_Guides/Visitation_Best_Practice_Guide.pdf [https://perma.cc/WMZ2-XLU5]; STATE OF MICH. DEP'T OF HEALTH & HUM. SERVS., *supra* note 42, at 1–2.

service plan.[75] The pervasive practice of state agencies mandating completion of numerous services that are either unavailable or not needed is compounded by social and economic factors, such as lack of access to transportation, inflexible employment schedules, and limited financial resources, that complicate a parent's ability to comply.[76] Restricting visitation "as a form of punishment" for a parent's noncompliance with their service plan can harm children, have "deleterious effects on parental progress, and cause additional challenges or setbacks in [parents'] treatment and recovery."[77] Visitation also should not be restricted solely due to a parent missing visitation or arriving late to visitation, as at least one qualitative study found that inconsistency between parents' stated goals and follow-through may be due in part to parents' feelings of being alienated by the family regulation system.[78]

Additionally, visitation should not be limited "due to perceived or observed negative responses from the child."[79] Parent-child visitation following a child's removal from their home and placement in the foster system is often chaotic. Changes in a child's behavior do not necessarily mean visitation with the parent has harmed the child.[80] The change might, for example, mean the child has a secure attachment with the parent and should have *more* frequent contact with their parent.[81] The trauma of the child's removal from their home and separation from their parent may result in complex responses from the child. These responses could occur in anticipation of a parental visit, during a visit, or following a visit.[82] Children may display a range of emotions, including

75. HHS Memo, *supra* note 15, at 9–10; *see also* NAT'L COUNCIL OF JUV. & FAMILY CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 7, 16 (2016) (stating parent-child visitation "should not be used as a case compliance reward or consequence").

76. One social worker in a public defender office in New York described meetings at foster agencies where "well-intentioned bromides about not blaming or shaming parents tend to be forgotten by [caseworkers] loading up case plans with more services than parents can manage." Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform [https://perma.cc/A2E6-LSR9]; *see also infra* notes 255–62 and accompanying text (describing how drug screenings are often included in service plans when there is no allegation of substance misuse and the state agency or judge restricts visitation when a parent misses a drug screening); HHS Memo, *supra* note 15, at 9–10; Martin Guggenheim, *General Overview of Child Protection Laws in the U.S.*, *in* REPRESENTING PARENTS IN CHILD WELFARE CASES 2 (Martin Guggenheim & Vivek S. Sankaran eds., 2015) (stating that the state often requires a parent to complete services that are either unavailable or not needed).

77. HHS Memo, *supra* note 15, at 9.

78. Jennifer Sykes, *Negotiating Stigma: Understanding Mothers' Responses to Accusations of Child Neglect*, 33 CHILD. & YOUTH SERVS. REV. 448, 448–49 (2011).

79. HHS Memo, *supra* note 15, at 9.

80. *See* UNIV. OF PITTSBURGH OFF. OF CHILD DEV., CHANGES IN CHILDREN'S BEHAVIOR BEFORE AND AFTER PARENT VISIT 1–3, https://www.ocd.pitt.edu/sites/default/files/Parent_Guides/Foster-Parents/Parent%20Visit%20Behavior%20Changes.pdf [https://perma.cc/MHZ7-P393].

81. *Id.*

82. HHS Memo, *supra* note 15, at 9.

anger, sadness, and disappointment, and may have behavioral outbursts, such as excessive crying, sleep disturbances, and acting out.[83] Such behavior may reflect a child's feelings about being separated from their family and their confusion about living with a new family.[84] Children also may have unrealistic expectations about how the visit will go.[85] For example, a child may anticipate that they will be visiting with their parent in their home, with other family members, and with favorite toys and games when, in reality, the visit will occur in the foster agency office, supervised by a state agency employee who the child does not know, and the only family member present will be the child's mother. Thus, while it is *possible* for a child to experience harm during a visit, such possibility should not be assumed.

B. *Visitation as Risk Assessment*

Visitation is unique from other aspects of family regulation risk assessment because of its direct impact on a family's ability to reunify.[86] Visitation decisions, such as whether a parent and child can visit, how frequently and for how long they can visit, and what level of supervision to impose, all concern whether a child will be exposed to a risk of harm. The assumption that a parent's past conduct accurately predicts future conduct pervades the family regulation system.[87] Yet, the past does not always predict the future. One family court judge acknowledged that visitation "prediction," by nature, can never be certain.[88]

83. *Id.* at 9–10; *see also* UNIV. OF PITTSBURGH OFF. OF CHILD DEV., *supra* note 80, at 1–3.

84. HHS Memo, *supra* note 15, at 9–10.

85. UNIV. OF PITTSBURGH OFF. OF CHILD DEV., *supra* note 80, at 2.

86. In her groundbreaking book, sociologist Kelley Fong discusses the ways in which the family regulation system is risk assessment:

> Once a CPS report comes in, the frame of child maltreatment structures everything that follows. . . . It assesses families through a lens of future risk, subjecting the most marginalized families to ongoing state oversight. . . . Even the kindest, most understanding investigator represents an agency fundamentally focused on parental failures and empowered to separate families.

KELLEY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES 196 (Meagan Levinson & Erik Beranek eds., 2023) [hereinafter FONG, INVESTIGATING FAMILIES].

87. For example, during a professional development session, one family regulation administrator instructed her staff: "we know history is the best predictor of the future." *Id.* at 110.

88. *In re* I.R., 7 N.Y.S.3d 849, 852 (N.Y. Fam. Ct. 2015) ("The question presently before the court . . . is whether permitting the mother and child to have unsupervised visits now will expose the child to a risk of harm. As with many issues confronting Family Court, the question requires a prediction, which, by its nature, can never be certain. Nonetheless, the Court must make its predictive determination based upon the evidence presented.").

Bias informs how we perceive risk, including which children the state removes from their parents' care.[89] Bias undoubtedly affects visitation. One study on visitation in Illinois concluded that caseworkers' limited training on visitation increased the likelihood that their decisions were based on personal experiences and beliefs, rather than in accordance with state policy.[90]

Accordingly, visitation fits within the growing body of research documenting the family regulation system's disproportionate impact upon Black, Latinx, and Indigenous, and poor or working-class families.[91] For at least twenty-five years, scholars have noted that caseworkers have biases against parents based on class and race.[92] In a recent comprehensive empirical study jointly produced by the American Civil Liberties Union and Human Rights Watch, the authors concluded: "The child welfare system in the United States disproportionately investigates and removes children from over-policed, underserved communities, especially Black and Indigenous children and those

89. For example, participants in one study were more likely to deem a scenario as meeting the definition of neglect and warranting a report to the state child abuse hotline when it involved a Black baby than when the same scenario involved a white baby. *See* Sheila D. Ards, Samuel L. Myers, Jr., Patricia Ray, Hyeon-Eui Kim, Kevin Monroe & Irma Arteaga, *Racialized Perceptions and Child Neglect*, 34 CHILD. & YOUTH SERVS. REV. 1480, 1484 (2012); *see also* Katherine Elliott & Anthony Urquiza, *Ethnicity, Culture, and Child Maltreatment*, 62 J. SOC. ISSUES 787, 795 (2006); *Racial Disproportionality and Disparity in Child Welfare*, CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH & HUM. SERVS. 1 (Nov. 2016); *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH & HUM. SERVS. 1 (2021).

90. Muñoz, *supra* note 38, at xi–xii.

91. *See, e.g.*, ROBERTS, SHATTERED BONDS, *supra* note 30, at viii (asserting that the current child welfare system "disrupts, restructures, and polices Black families"); Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 770 (2021) (stating that the structure of the child welfare system "allows Black communities and homes to be controlled and occupied by" state workers); Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471, 474 (2021) (explaining that empirical research has well-documented the "institutionalization of racial disproportionality and disparity in the child welfare system"); Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 254 (2020) (noting that, in addition to Black children, Native American and Latinx children are disproportionately affected by the child welfare system); Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1785 (2019) (analyzing how low-income mothers "engaged in a selective or constrained visibility" from Child Protective Services' "widespread presence in poor communities" in order to protect themselves from CPS reports); Stephanie Smith Ledesma, *The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 31–32 (2014) (stating that the "vast majority" of child welfare reports are for neglect, which are "typically related to poverty," and that "the majority of these removals involve" Black children).

92. *See, e.g.*, Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688, 707 (1998).

living in poverty."[93] Children of color not only enter the foster system at disproportionate rates, but they also remain in the system longer, experience a greater number of foster placements, and are less likely to be reunified with their parents or adopted than white children.[94] For these reasons, the family regulation system is increasingly referred to as "America's caste system"[95] or an "apartheid institution."[96]

The Supreme Court recently referenced our country's horrifying history of forcible state separation of families in *Haaland v. Brackeen*.[97] In his concurring opinion, Justice Neil Gorsuch spent pages chronicling the ghastly history that precipitated the Indian Child Welfare Act of 1978 ("ICWA"), including systematic separation of Indian children from their families and communities.[98] The goal, as Justice Gorsuch put it, was to "allow 'civilized people' to raise the children."[99] Recognizing the "undeniable" parallels in Justice Gorsuch's description of pre-ICWA family separation to today's system, Professor Stephanie Glaberson noted that while the effort to destroy Native families distinguishes itself as uniquely genocidal, it is not entirely different from the approach the United States has used against many families and communities deemed unworthy or undesirable.[100]

C. *Lack of Data Obscures Scope of Problem*

While the previous two sections concerned why visitation matters both to individual families and within the legal framework, this section highlights a related and ongoing problem: absence of comprehensive data on visitation. This absence is underscored by the reality that hearings and records in the family regulation system are sealed and confidential in most states.[101] Family regulation system data plays an important role in improving transparency and accountability and has helped address stark racial disparities.[102]

93. *"If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System*, HUM. RTS. WATCH (2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare [https://perma.cc/Z3YR-XAFH].

94. ROBERT B. HILL, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 34 (2006).

95. Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE. & L. 601, 606 (2022).

96. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003).

97. Haaland v. Brackeen, 143 S. Ct. 1609, 1619 (2023).

98. *Id.* at 1641–47 (Gorsuch, J., concurring).

99. *Id.* at 1644 (Gorsuch, J., concurring).

100. Stephanie K. Glaberson, *The Supreme Court's Indian Child Welfare Decision Neglected One Big Thing*, SLATE (June 26, 2023, 1:48 PM), https://slate.com/news-and-politics/2023/06/supreme-court-indian-child-welfare-gorsuch-foster-care.html [https://perma.cc/WZ8R-8TVZ].

101. *See* Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2 (2010).

102. *See supra* notes 91–94 and accompanying text.

The lack of visitation data exists both because few are counting and because of the difficulty in accurately counting. This section addresses how federal foster system reporting requirements do not mandate the collection of data on visitation between parents and their children. States are required to report data[103] twice annually to the Adoption and Foster Care Analysis and Reporting System ("AFCARS"), a database maintained by HHS's Children's Bureau.[104] AFCARS includes case-level information on all children in foster care.[105] While AFCARS requires states to report data on caseworker visits with children, including the date and location of each visit,[106] it fails to collect such data on visits between parents and their children. A different federal child welfare data collection program, the National Child Abuse and Neglect System ("NCANDS"), similarly fails to collect data regarding visitation between parents and their children in foster care, even though NCANDS tracks services and activities designed to "help[] parents enhance their strengths"[107] and to "support families preparing to reunify."[108] NCANDS does not consider parent-child visitation a service or activity.[109]

The difficulty in defining and categorizing visitation problematizes the ability to gather data. While "supervised" and "unsupervised" are binary terms, visitation can exist along a continuum. Visitation plans can dually consist of supervised and unsupervised visitation.[110] For example, a family's visitation plan could consist of unsupervised time every other visit or one unsupervised visit per month. A single visit, itself, can also be both supervised and unsupervised.[111] Such visits, often called "sandwich visits," may start and end under state agency supervision but include unsupervised time in the middle to allow, for example,

103. *See* 45 C.F.R. § 1355.40(b)(1) (2018).

104. *See* Child.'s Bureau, *Adoption and Foster Care Analysis and Reporting System (AFCARS)*, U.S. DEPT. OF HEALTH & HUM. SERVS., https://www.acf.hhs.gov/cb/fact-sheet/about-afcars [https://perma.cc/F3X2-AHB5] (describing the AFCARS data system).

105. *Id.*

106. *See* 45 C.F.R. § 1355.44(f)(5)–(6) (2023).

107. U.S. DEP'T OF HEALTH & HUM. SERVS., NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (NCANDS) CHILD FILE CODEBOOK, 60 (2019) [hereinafter CODEBOOK] (explaining that the NCANDS data reporting system is voluntary, not mandatory, for states); 45 C.F.R. § 1355.20(a) (2019).

108. CODEBOOK, *supra* note 107, at 61.

109. Some states consider the visitation plan as part of the service plan. *See, e.g.*, ILL. DEPT. OF CHILD. & FAM. SERVS., *supra* note 73, § 301.210(g) (noting requirements for completing and continually reviewing "[t]he Service Plan (which involves the Visitation Plan)").

110. *See, e.g.*, *id.* § 301.210(e) ("If the purpose of supervision is to assess interaction between parent and child and to support relationship building and teach parenting and communication skills, the degree and frequency of supervision may not need to be as high as it would be if there were significant protective service concerns. Therefore, the need for every visit to be supervised shall be continually assessed and decreased as soon as safely possible.").

111. *See, e.g.*, *In re* Jose F., 2020 WL 8262246, at *6 (N.Y. Fam. Ct. Dec. 21, 2020) (unpublished table decision) (ordering "[t]he subject children's visits will continue to be agency or approved resource supervised with 1 hour of unsupervised time").

a family to go to a playground or a restaurant.[112] For large state agencies accustomed to meeting their reporting requirements by checking off boxes on a form, visitation on a continuum complicates data collection.

II. LEGAL FRAMEWORK GOVERNING VISITATION

A dizzying degree of variation in visitation law exists across jurisdictions. This lack of uniformity creates disparate practices. For this Article, a review of visitation law in all fifty states was conducted. Rather than present data from each of the fifty states, this part presents law and trends that are representative of visitation law in the family regulation system across all fifty states.

Proceedings to remove a child from their home and place them in the foster system generally begin when a state agency files a petition alleging that a parent has neglected or abused the child.[113] The court may grant the state temporary custody of the child as a result of the allegations.[114] If the court makes such an order, the case moves toward trial on the allegations pled in the petition.[115] The time to commence and complete a trial can take weeks, months, or years, depending on the jurisdiction.[116]

Balancing the fundamental right to family integrity with the state's *parens patriae* power to protect children from neglect and abuse implicates a complex

112. N.Y.C. ADMIN. FOR CHILD.'S SERVS., A GUIDE FOR PARENTS OF CHILDREN IN FOSTER CARE, 30 (2022), https://www.nyc.gov/assets/acs/pdf/parent_handbook.pdf [https://perma.cc/Z9CL-6ZDM] (defining sandwich visit); *see also In re* Leenasia C., 59 N.Y.S.3d 355, 357 (N.Y. App. Div. 2017) (where the court granted the mother one-hour unsupervised "sandwich visits" twice per week); *In re* Gerald Y.-C., 54 N.Y.S.3d 10, 11 (N.Y. App. Div. 2017) (describing litigation over thirty minutes of unsupervised visitation "sandwiched" into supervised visits).

113. *See, e.g.*, N.Y. FAM. CT. ACT § 1031(d) (McKinney 2024) ("[T]he petition shall allege facts sufficient to establish that the return of the child to the care and custody of his parent or other person legally responsible for his care would place the child in imminent danger of becoming an abused or neglected child."); CAL. WELF. & INST. CODE § 300 (2023).

114. The New York Family Court Act sets out a framework for a hearing to be held "no later than the next court day after the filing of a petition to determine whether the child's interests require protection, including whether the child should be returned to the parent or other person legally responsible." N.Y. FAM. CT. ACT § 1027(a)(i) (McKinney 2024). Following a hearing, "if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child" and may remand the child with the local commissioner of social services. FAM. CT. ACT § 1027(b)(i). A child may be removed prior to the filing of the petition on an emergency basis. FAM. CT. ACT § 1024(a); *see also* FAM. CT. ACT § 1022(a)(i).

115. The evidentiary standard at a fact-finding hearing for abuse and neglect allegations is "preponderance of evidence." FAM. CT. ACT § 1046(b)(i).

116. *See infra* Section III.C (describing how a family in one case, *In re Joziah P.*, 2020 WL 3042258 (N.Y. Fam. Ct. May 26, 2020) (unpublished table decision), waited three years for the trial to commence and then nearly another year for the trial to conclude). Families can even wait months in some jurisdictions for a so-called "emergency hearing" that determines whether a child can return to their parents care under state supervision pending trial. *See, e.g.*, Clara Pressler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733, 757–58 (2021) (describing the family separation of a seven-year-old from his parents for two months while awaiting an emergency hearing).

body of federal and state constitutional and statutory law.[117] The right to family integrity extends to children, as scholars and lower courts have stated.[118] While the U.S. Supreme Court has never directly addressed the issue of visitation, it crucially held in *Santosky v. Kramer*[119] that parents retain constitutionally protected parental rights even *after* a contested court proceeding that results in a child's temporary placement in the foster system.[120]

These constitutional protections underpin federal law. Once the state places a child in the foster system, the Adoption and Safe Families Act of 1997[121] ("ASFA") requires state agencies to employ, and courts to oversee, "reasonable efforts" to make it possible for the prompt, safe return of children to their families.[122] ASFA has been the source of voluminous and critical scholarship.[123]

117. *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion); Santosky v. Kramer, 455 U.S. 745, 758–70 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27–33 (1981); Parham v. J.R., 442 U.S. 584, 598–608 (1979); Stanley v. Illinois, 405 U.S. 645, 649–53 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925).

118. *See, e.g.*, Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 271 (2021).

119. 455 U.S. 745 (1982).

120. *Id.* at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

121. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

122. *See* 42 U.S.C. § 671(a)(15)(B). While ASFA also requires reasonable efforts to prevent the need for a child's placement in the foster system, see 42 U.S.C. § 672(a), this Article focuses on the reasonable efforts courts must find that agencies made towards the return of children to their families. ASFA exempts reasonable efforts requirements in cases where parents previously lost their parental rights or committed certain crimes or acts of abuse. *See* 42 U.S.C. § 671(a)(15)(D).

123. Of note, preeminent family regulation scholar Martin Guggenheim has described ASFA as "the worst law affecting families ever enacted by Congress" and attributed to it "the unnecessary destruction of hundreds of thousands of families." Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 722 (2021); *see also* Alison Peebles, *When Permanency Is Permanent Separation: In the Family Regulation System, a Temporary Removal Fast Tracks Terminating Parents' Rights*, 31 J.L. & POL'Y 197, 197 (2023) (asserting that "ASFA's rigid timeline coupled with persistent court delays make state intervention via temporary removal a central contributing factor to a termination of parental rights"); Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 317 (2023) (arguing for ASFA's total repeal as any attempt to amend ASFA would be insufficient to address its fundamental flaws); Vivek S. Sankaran, *Child Welfare's Scarlet Letter: How a Prior Termination of Parental Rights Can Permanently Brand a Parent as Unfit*, 41 N.Y.U. REV. L. & SOC. CHANGE 685, 692–96 (2017) (describing how ASFA allowed states to forgo making reasonable efforts to reunify a family once a parent's rights to another child had been terminated in the past and permitted states to proceed immediately to terminate that parent's rights again); Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 130 (2001) (describing ASFA as a "federal law helping to turn the nation's child welfare systems into the ultimate middle-class entitlement. Step right up and take a poor person's child for your own.").

Family reunification is presumed to be in the child's best interest,[124] and, pursuant to ASFA, state agencies must work with families to develop individualized case plans to aid rehabilitation and reunification.[125] Visitation between parents and their children must be provided in accordance with individual case plans.[126] However, ASFA sets strict timelines limiting reunification efforts. This timeline requires, with few exceptions, state agencies to file petitions to terminate parental rights when a child has remained in the foster system for fifteen out of twenty-two months, even when there was no compelling need for foster placement or the family could otherwise be supported.[127]

A survey of state law reveals that the majority of jurisdictions fail to define what visitation the state must provide to parents and their children in the foster system. That is, most state laws use vague, indeterminant language,[128] such as that the state must offer "reasonable" visitation[129] or visitation that "is in the best interest"[130] of the child. Some states mandate "frequent" visitation, but "frequent" is not defined.[131] Few states specify a minimum amount of visitation

124. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2024) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."); *see also* Tracy J. v. Super. Ct., 136 Cal. Rptr. 3d 505, 511 (Cal. Ct. App. 2012) (2012) ("Until services are terminated, family reunification is the goal and the parent is entitled to every presumption in favor of returning the child to parental custody." (citing CAL. WELF. & INST. CODE §§ 366.21, 366.22 (2024))).

125. 42 U.S.C. § 671(a)(15)(B). Such individualized case plans must be made within ninety days of removing a child, *id.* §§ 675(5)(F)(ii), 675a(c)(1)(A), and states must hold review hearings regarding children in the foster system at least every twelve months, *id.* § 675(5)(C)(i).

126. A "service plan," in theory, is a list of services that parents and children are to engage in, collectively and individually, in consultation and cooperation with the parent. N.Y. SOC. SERV. L. § 409-e(2) (McKinney 2024).

127. *See* 42 U.S.C. § 675(5)(E) (listing exceptions such as when a child is in a foster home with a biological relative, when there is a compelling reason that termination is not in the child's best interest, and when the state had failed to provide necessary services to support reunification). Disturbingly, the law only contains financial incentives for states when adoption is achieved, not when families are reunified. *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 4–5 (2013).

128. *See* Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 217 (2022) (describing indeterminacy at all levels of family regulation law).

129. *See, e.g.*, ALASKA STAT. § 47.10.080(p) (2024); HAW. REV. STAT. ANN. § 587A-26(e)(3) (2024); COLO. REV. STAT. § 19-3-217(1) (2024); NEV. REV. STAT. ANN. § 432B.550(3)(a) (2023); N.Y. FAM. CT. ACT § 1030(a) (McKinney 2024) ("A [parent] shall have the right to reasonable and regularly scheduled visitation."); OKLA. STAT. tit. 10A § 1-4-707(A)(6)(a) (2024).

130. N.C. GEN. STAT. § 7B-905.1(a) (2024).

131. *See, e.g.*, CONN. GEN. STAT. § 17a-10a (2024) ("as frequently as reasonably possible"); CAL. WELF. & INST. CODE § 362.1(a)(1) (2024) ("Visitation shall be as frequent as possible, consistent with the well-being of the child."); WASH. REV. CODE § 13.34.136(2)(ii)(A) (2024) (mandating that CPS agency "shall encourage the maximum parent and child and sibling contact possible, when it is in the best interest of the child").

required.[132] At least two states presume that visitation shall be "unsupervised."[133] When visitation is supervised, a few states address who should serve as the supervisor.[134] Several states address visitation location.[135] At least one state considers whether a mother is breastfeeding her child.[136]

Most states grant discretionary authority to state agencies to increase, restrict, and terminate visitation without obtaining a court order.[137] In contrast, Washington, which robustly modified its visitation law in 2021, requires court determination before visitation may be restricted, and visitation cannot be used "as a sanction" for a parent's failure to comply with court orders or services.[138] While Section I.C described how aspects of the family regulation system treat visitation as a reward that a parent must earn, visitation is explicitly regarded as "the right of the family, including the child" in Washington's statutory scheme.[139] Washington's acknowledgment that children maintain a right to visitation is consistent with its assertion that a child cannot be penalized for a parent's actions. In this way, the nature of the right may change the court's interpretation and application of visitation. However, Washington law does not specify a minimum amount of visitation required.[140]

132. *See, e.g.*, MD. CODE REGS. 07.02.11.05(C)(7)(a) (2023) ("offer[ing]" the parents weekly visits).

133. GA. CODE ANN., § 15-11-112(b) (2023); WASH. REV. CODE § 13.34.136(2)(b)(ii)(E) (2024).

134. *See, e.g.*, WASH. REV. CODE § 13.34.136(2)(ii)(D) (2024) (the state "should" rely upon community resources, relatives, and other appropriate persons to provide transportation and supervision for visitation); TEX. FAM. CODE § 263.107(C)(5)(A) (2023) (the state must ensure visitation "is properly supervised by a department employee or an available and willing volunteer the department determines suitable after conducting a background and criminal history check.").

135. *See, e.g.*, ALA. ADMIN. CODE r. 660-5-50-.06(c)–(d) (2024) (noting that visits should be organized around events such as shopping, picnics, recreational outings and visiting arrangements should encourage parents to engage in the parenting role through such activities as doing homework, providing meals, and attending school appointments); FLA. ADMIN. CODE Ann. r. 65 C-28.002(d) (2024) ("To the extent possible, visitation shall occur in a home-like setting and, unless unavoidable, not in an institutional setting or office.").

136. IOWA ADMIN. CODE r. 441-108.7(11) (2023).

137. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/2-10(1) (2024) (granting discretionary authority to the state agency to increase, restrict, and terminate parent-child contact without court order); N.C. GEN. STAT. § 7B-905.1(b) (2024) ("Unless the court orders otherwise, the director [of the county department of social services] shall have discretion to determine who will supervise visits when supervision is required, to determine the location of visits, and to change the day and time of visits . . . ."); TEX. FAM. CODE § 263.107(e) (2023) (authoring the state agency to "amend the visitation plan" as it "considers necessary."). A parent maintains the ability to file a motion to challenge the agency's action, but the court may not hear the motion until the next scheduled court date and, generally speaking, courts largely defer to state agencies. *See infra* Section III.A.

138. WASH. REV. CODE § 13.34.136(2)(b)(ii)(B), (C) (2024); Child Welfare Proceedings—Parent-Child Visitation, ch. 208, 2021 Wash. Sess. Laws 1380 (codified as amended in scattered sections of WASH. REV. CODE § 13.34). For the legislative history of Washington's law, see *Bill Information: HB 1194 – 2021–22*, WASH. ST. LEG., https://app.leg.wa.gov/billsummary?BillNumber=1194&Initiative=false&Year=2021 [https://perma.cc/AQ52-7YYD].

139. *See* WASH. REV. CODE § 13.34.136(2)(b)(ii)(A) (2024).

140. *See id.*

The patchwork of state visitation law is further complicated by the gap between law and policy. Several state policies describe progressive visitation models that provide a framework to evaluate when a family's visitation should expand, and what to do if there is a setback in progressing between levels.[141] For example, Texas maintains a robust written visitation policy that cites research on the benefits of visitation, such as "infants and toddlers benefit from daily visitation"[142] and the importance of "increased visitation" for youth transitioning into adulthood.[143] It also provides a guide of supervision from most to least restrictive.[144] Yet the state statute simultaneously grants wide discretion to disregard its progressive visitation model and simply provide families with "minimum visitation."[145]

A state's own policy can also be contradictory. For example, Illinois's policy emphasizes the "key to successful on-going visits" rests on scheduling the initial visit "quickly" after the child's placement in the foster system, as children have just "been removed from the most important contacts in their lives—their families.[146] Yet "quickly" is defined by up to two weeks after the state takes custody of the child.[147] To be clear, the state could remove a child from their parents' custody and the state agency would be in compliance with its policy if that child's first contact with their parent was fourteen days later. The state agency's policy also "recognizes that there is a strong correlation between regular parental visits and contacts with a child and the child's discharge from placement services."[148] However, this recognition translates to a single visit per week.[149] In practice, the duration of this once-a-week visit is one hour (equivalent to roughly two days per year). This default practice of a single one-

141. *See, e.g.*, HAW. DEP'T OF HUMAN SERVS., CHILD WELFARE SERVICES MANUAL PART III CASEWORK SERVICES 61 (2010), https://shaka.dhshawaii.net/greenbook/publishing12/ch03/chp3sec4.pdf [https://perma.cc/B3J3-WVWH]; MINN. DEP'T OF HUM. SERVS., CHILD AND FAMILY VISITATION: A PRACTICE GUIDE TO SUPPORT LASTING REUNIFICATION AND PRESERVING FAMILY CONNECTIONS FOR CHILDREN IN FOSTER CARE 24–28 (2009), https://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/Visitation_-_Child_and_Family_Visitation_-_A_Practice_Guide_(DHS)_(Jan._2009).pdf [https://perma.cc/6CZS-UG9B]; OFF. OF CHILD WELFARE, OR. DEP'T OF HUM. SERVS., ODHS CHILD WELFARE PROCEDURE MANUAL ch. 5, § 26 (2024), https://www.oregon.gov/odhs/rules-policy/Documents/cw-procedure-manual.pdf [https://perma.cc/9SMA-PHN5]; OFF. OF CHILD. AND FAMS. IN THE COURTS & ADMIN. OFFS. OF PA. CTS., 2012 VISITATION FREQUENCY AND DURATION GUIDE 11–12 (2012), https://ocfcpacourts.us/wp-content/uploads/2020/05/N-Chapter-8-Visitation-And-Benchcard-002424.pdf [https://perma.cc/REG3-QKSP (staff-uploaded archive)]; TEX. DEPT. OF FAM. & PROTECTIVE SERVS., *supra* note 74, at 14.

142. TEX. DEPT. OF FAM. & PROTECTIVE SERVS., *supra* note 74, at 15–16.

143. *Id.* at 16.

144. *Id.* at 6–8.

145. TEX. FAM. CODE ANN. § 262.115(d) (2023).

146. ILL. DEPT. OF CHILD. & FAM. SERVS., *supra* note 73, § 301.210(b), (c).

147. *Id.* § 301.210(c).

148. ILL. ADMIN. CODE tit. 89, § 301.210(a) (2024).

149. *Id.* § 301.210(b)(4).

hour visit per week is further reflected in policy: "This will be the first opportunity to 'test' the process of reunification by *possibly* including a second hourly visit each week."[150] In other words, Illinois's executive state agency understands the "strong correlation" between visitation and children exiting the foster system, but would not outright provide visitation more than once per week.

All states nationwide have enacted "reasonable efforts" legislation to comply with ASFA and ensure their access to federal funding.[151] Yet, nowhere does Congress define "reasonable efforts" and, as a result, both state agencies and the judiciary have no guidance to inform what efforts are, in fact, reasonable. Most state statutes adopt ASFA's vague language and fail to clarify what "reasonable efforts" means.[152] As a result, state agencies use their discretion to decide what efforts to make. The judiciary then uses its discretion to determine whether the state agency's efforts were reasonable, which inevitably results in inconsistency.[153] Many courts rely on boilerplate forms with a checkbox for whether reasonable efforts were made.[154] Scholars have found that it is exceedingly rare for courts to enter findings that a state agency failed to make reasonable efforts.[155] One survey showed that less than four percent of judges had ever made a finding of no reasonable efforts.[156] Another showed that over ninety percent of surveyed judges rarely or never made a no-reasonable-efforts finding.[157] Most troubling, over forty percent of surveyed judges acknowledged making reasonable efforts findings even when they believed that the agency had not, in fact, made those efforts.[158] Professor Jane M. Spinak notes that family courts issue few opinions on the reasonableness of state agency

150. ILL. DEPT. OF CHILD. & FAM. SERVS., *supra* note 73, § 301.210(h).

151. 42 U.S.C. § 679b(a)(4) (requiring regulations to evaluate state performance of ASFA's requirements as a condition of continued funding).

152. Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT'L. L.J. 259, 282, 293 (2003). For example, in Colorado "reasonable efforts" means the exercise of diligence and care to reunify a parent with his or her children. COLO. REV. STAT. § 19-1-103(114) (2024).

153. MUSKIE SCH. OF PUB. SERV., MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 104–05 (2005) (noting that some judges make findings of reasonable efforts even when they do not believe this to be true).

154. SPINAK, END OF FAMILY COURT, *supra* note 31, at 185 (describing the addition of a "reasonable efforts made" check box to all relevant court order forms to both expedite court decision-making and secure federal funds).

155. Sankaran & Church, *supra* note 53, at 227.

156. *Id.*

157. MUSKIE SCH. OF PUB. SERV., *supra* note 153, at 105.

158. *Id.*

efforts during the crucial time period immediately following a child's placement in the foster system.[159]

III. HOW VISITATION REGULATES FAMILIES

For a parent who has temporarily lost custody of a child to the state, visitation often forms the foundation for regaining custody.[160] Part I described why visitation matters. Part II provided the legal framework governing visitation. This part focuses on the use of visitation law in the family regulation system. It first looks at the role of the judiciary in outsourcing visitation to the state agency. It then examines how the state agency, with nearly unfettered discretion, makes visitation decisions and what motivates those decisions. Finally, it considers the curious position of state agencies given the evidence created by their visitation decisions and the implications of that evidence.

A. *Judicial Failure to Rigorously Oversee Agency Action*

Given the state power exercised and the fundamental rights involved, one would think that courts *should* protect the right to visitation.[161] The basic function of constitutional rights is to limit the government's ability to interfere with individual liberties.[162] Visitation is the process by which the state determines precisely how much liberty it will take from a parent and their child.

159. SPINAK, END OF FAMILY COURT, *supra* note 31, at 206–07 (explaining that case law on reasonable efforts "usually tells the story at the end of the journey, when the question before the court is whether parental rights should be terminated").

160. On behalf of one of my clients when I was a public defender in New York, I filed eight motions over the course of a year to steadily expand my client's visitation with her toddler. As the trial court granted these motions, visitation slowly expanded in frequency, duration, location, and level of supervision. When the court ultimately ordered the reunification of the child with my client, over the objection of the state agency, the court recognized the integral role of visitation in the court's decision to reunify the family:

> determining whether [the child's] physical or emotional health is at risk is a fact-intensive inquiry . . . an inquiry that this court has made repeatedly in considering the eight motions filed by the respondent mother from December 2014 to the present seeking expanded unsupervised contact with her son. . . . On the return date of each motion, the court has heard oral argument from counsel as well as taken sworn testimony from the agency case planner on whether there are outstanding safety concerns. No safety concerns have ever been reported, and the mother's interactions with the child have always been described as appropriate and loving.

Samuel W. v. Luemay F., 2015 WL 5311117, at *1–2 (N.Y. Fam. Ct. Sept. 2, 2015) (unpublished table decision).

161. Consistent with this view, the Supreme Court in *Stanley v. Illinois* wrote that children "suffer from uncertainty and dislocation" when removed from their parents. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

162. Cong. Rsch. Serv., *Intro.7.4 Individual Rights and the Constitution*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.7-4/ALDE_00000033/ [https://perma.cc/6HA9-RSF3].

Although states give their family courts broad jurisdiction over children alleged to have been neglected or abused, a survey of case law reveals that the judiciary outsources visitation to state agencies and is reluctant to intervene with agency determinations.[163] The proliferation of state task forces on visitation further reflects that executive state agencies maintain the primary role in deciding what visitation the family should receive.[164]

The judiciary's outsourcing of visitation occurs as a result of both state statutes and historical practice. Under Illinois law, for example, when the court grants the state temporary custody of a child, the state agency, the Department of Children and Family Services ("DCFS"), must "file with the court and serve on the parties" a parent-child visiting plan within ten days.[165] The statute further grants DCFS "discretionary authority" to increase, restrict, and terminate visitation *without* court order.[166] The onus to challenge the visitation both decided and implemented by DCFS rests upon a party, namely the parent,[167] to file a motion and bring the matter before the court.[168] The Illinois Juvenile Court Act states that "[c]hild development principles shall be

163. Some jurisdictional split appears on how much discretion to afford state agencies on the issue of visitation. For example, more than twenty years ago, the Maryland appellate court held "the court may not delegate its responsibility to determine the minimal level of appropriate contact between the child and his or her parent or other guardian" and that the court must determine, "at least the minimal amount of visitation that is appropriate . . . as well as any basic conditions that it believes, as a minimum, should be imposed." *In re* Justin D., 357 Md. 431, 449–50 (2000). In sharp contrast, the Illinois legislature explicitly grants the state agency "discretionary authority" to increase, restrict, and terminate visitation *without* court order. 705 ILL. COMP. STAT. ANN. 405/2-10(2) (2024). The Washington legislature in 2021 enacted a law in which only the judiciary—not the state agency—is authorized to restrict visitation. WASH. REV. CODE § 13.34.136(2)(b)(ii)(C) (2023).

164. *See, e.g.*, MICH. PARENT-CHILD VISITATION TASK FORCE, ENSURING CHILD AND FAMILY WELL-BEING PROMOTING TIMELY PERMANENCY 15 (2013), https://www.courts.michigan.gov/4a2e47/siteassets/reports/cws/michigan-parent-child-visitation-task-force-report_2013.pdf [https://perma.cc/AD38-M3H7]; COLO. REV. STAT. § 19-3-901 (2024) (legislative declaration of Colorado's task force on visitation); WORTHINGTON, *supra* note 18, at 11.

165. 705 ILL. COMP. STAT. ANN. 405/2-10(2) (2024) ("The parent-child visiting plan shall set out the time and place of visits, the frequency of visits, the length of visits, who shall be present at the visits, and where appropriate, the minor's opportunities to have telephone and mail communication with the parents."). Many state statutes, like Illinois's, task the foster agency with creating a visitation plan. *See, e.g.*, FLA. STAT. § 39.402(9)(a) (2024); KY. REV. STAT. § 620.150 (2024). Of note, during my time as a clinical teacher and guardian *ad litem* in Cook County, Illinois, I never observed DCFS filing and serving a parent-child visiting plan as mandated by statute.

166. 705 ILL. COMP. STAT. ANN. 405/2-10(2) (2024).

167. While the role of guardians *ad litem* and attorneys for the child in family regulation proceedings is beyond the scope of this Article, I take the position that such attorneys predominately function as co-prosecutors with the state. *See generally* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005) (providing a summary of trends in the children's rights movement that treat children's interests as antagonistic to those of their parents).

168. 705 ILL. COMP. STAT. ANN. 405/2-10(2) (2024) ("Any party may, by motion, request the court to review the parent-child visiting plan . . . to determine whether it is consistent with the minor's best interest . . . [t]he frequency, duration, and locations of visitation shall be measured by the needs of the child and family, and not by the convenience of Department personnel.").

considered by the court in its analysis of how frequent visitation should be, how long it should last, where it should take place, and who should be present."[169] However, in a visible demonstrative of the judiciary's entrenched practice of deference to DCFS, the boilerplate visitation order utilized in Cook County, Illinois lacks any option for the court to order unsupervised visitation.[170] Rather, the only checkbox for unsupervised visitation is "at the discretion of DCFS."[171] This boilerplate language in the order reflects both judicial reluctance to rule on visitation and shared understanding that visitation is under the purview of DCFS.

Even when a court orders visitation to expand, courts rarely order when and how the expansion should occur and, rather, leave those determinations in the hands of the state agency, which may do nothing. T.J.'s case, described at the outset of the Article,[172] illustrates this phenomenon.[173] The visitation supervisor reported that T.J.'s parents, during their once-a-week supervised visitation, "demonstrated a parental role with T.J., responded appropriately to his verbal and nonverbal signals, put his needs ahead of their own and consistently displayed empathy towards him."[174] Accordingly, the trial court entered an order authorizing the state agency to progressively expand the family's once-a-week supervised visitation to unsupervised day visits, then overnights, and ultimately a sixty-day home visit.[175] The trial court's order could have directed when and how the state agency would expand visitation.[176] Alternatively, the trial court could have calendared the case within a relatively short period of time, such as two to four weeks, to receive a report from the state agency on the status of visitation expansion.[177] However, the trial court simply "authorized the Agency to implement" the visitation expansion with no further instruction.[178] The state agency never exercised its authority to expand visitation.[179] Consequently, T.J. and his parents continued to receive once-a-

169. *Id.*

170. CLERK OF CIR. CT. OF COOK CNTY., ILL., ORDER ON VISITING, FORM CCJP 0120 A/B (2024), https://services.cookcountyclerkofcourt.org/Forms/Forms/pdf_files/CCJP0120.pdf [https://perma.cc/F6PV-GDRF].

171. *Id.*

172. *See supra* notes 2–14 and accompanying text.

173. Tracy J. v. Super. Ct., 136 Cal. Rptr. 3d 505, 515 (Cal. Ct. App. 2012).

174. *Id.* at 509.

175. *Id.*

176. CAL. WELF. & INST. CODE § 362.1(a)(1)(A) (2024) ("Visitation shall be as frequent as possible, consistent with the well-being of the child."); *see also In re* Alvin R., 134 Cal. Rptr. 2d. 210, 217–18 (Cal. App. 2 Dist. 2003).

177. WELF. & INST. CODE § 300 (defining children subject to the jurisdiction of the court).

178. *Tracy J.*, 136 Cal. Rptr. 3d at 509.

179. *Id.*

week supervised visitation despite the lack of evidence that increased visitation presented a safety risk to T.J.[180]

Widespread judicial reluctance to intervene on issues of visitation occurs despite pleas for judges to rein in the unfettered visitation discretion afforded to state agencies.[181] This judicial reluctance also operates contrary to decisions about whether a child can be in their parent's custody. That is, the judiciary rarely, if ever, delegates authority to a state agency to either remove a child from their parent's care or send a child home from foster care.[182] Despite the centrality of robust parent-child visitation to family reunification, as discussed in Section I.A, the judiciary almost universally outsources visitation to the state agency. Such outsourcing directly impacts, usually negatively, a family's ability to reunify.

Further, family regulation courts' outsourcing of visitation to state agencies relies on a false dichotomy between "custody" and "visitation," which courts presiding over private custody disputes have begun to recognize as one and the same.[183] In fact, laws governing private custody disputes have increasingly replaced the terms, "custody" and "visitation," with the collective term, "parenting time."[184] Reflecting such sentiment, one court in a private guardianship case found "[v]isitation, like custody, is at the core of a parent's

180. *Id.* at 509–11.

181. *See, e.g.*, Leonard Edwards, *Parental Visitation in Child Protection Cases*, BENCH, Spring 2014, at 8, 8, http://www.judgeleonardedwards.com/docs/visitation-juv-ct-corner-bench-spr-2014.pdf [https://perma.cc/GB79-DMNX] ("[O]utlin[ing] the steps a judge should take to ensure that appropriate visitation is provided to children in foster care.").

182. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-815(c)(2)(ii) (West 2024) (requiring the court to hold a hearing "not later than the next day" when the state has conducted an emergency removal of a child from their parents' custody); COLO. REV. STAT. § 19-3-403(3.5) (2024) (requiring the court to hold a hearing within seventy-two hours after the state has taken custody of a child to determine "further custody of the child" or whether the emergency removal of the child should continue).

183. Case law governing private child custody disputes between parents has for decades acknowledged the benefits children receive from maintaining relationships with parents, even those who cannot care for them. *See* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 454 (1983). Most states presume that parents who are not together will share custody of children, and parenting plans in private family law allocate not only a detailed schedule designating the child's physical presence on any given day of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, but also the multiple facets of a parent's decision-making authority, such as education, health care, religious upbringing, and emergency decisions affecting the health or safety of the child. *See, e.g.*, WASH. REV. CODE § 26.09.184 (2024) (outlining several considerations in creating a permanent parenting plan).

184. *See, e.g.*, 750 ILL. COMP. STAT. 5/602.7 (2024) (providing that the court shall allocate "parenting time" in the absence of a mutually agreed upon parenting plan by the parties); 750 ILL. COMP. STAT. 5/600(e) (defining "parenting time" as "the time during which a parent is responsible for exercising caretaking functions"). Further, parenting time can only be restricted when, based upon a preponderance of the evidence, the court determines that a parent's exercise of parenting time would *seriously endanger* the child's physical, mental, moral, or emotional health. 750 ILL. COMP. STAT. 5/602.7(b) (emphasis added).

relationship with a child; being physically present in a child's life, sharing time and experiences, and providing personal support are among the most intimate aspects of a parent-child relationship."[185] When a parent's service plan prescribes both the services and visits that a parent must "complete" in their attempt to reunify with their children, the message unintentionally conveyed is that "visits are another hoop to jump through in order to satisfy the court."[186] One retired family court judge has urged replacing "visitation" with "family time" in order to emphasize the importance of quality time between parents and their children, which is "fundamental to our understanding of the positive aspects of human social behavior."[187] The term "family time" also appropriately recognizes that parents and their children placed in the foster system remain a family and maintain a right to ongoing contact with each other.

B. *Automatic, Minimal, "One-Size-Fits-All" Visitation*

More than fifteen years ago, a family court judge declared that the "[s]tandard supervised biweekly, one-or-two hour visitation is inadequate, inappropriate and unacceptable."[188] Little, if anything, has changed since then.[189] During my time as a clinical teacher and guardian *ad litem* for children in Cook County, Illinois, caseworkers routinely and authoritatively told me that, if the court had ordered the child to be temporarily placed in the custody of the state, then the visitation plan "will be" once-a-week at the agency office, supervised by the caseworker. There was no negotiation. The family's circumstances—case allegations, reason for placement in the foster system, needs, and ages of children—were irrelevant. All families received once-a-week supervised visitation at the agency office. A parent or child seeking increased visitation needed to file a motion, and the court would hear the motion on the next scheduled court date, which could be weeks or months away.

By law, supervision should only be imposed when necessary to protect the child.[190] Yet, in practice, families separated by the state almost universally begin

185. L.B. v. Chief Just. of Prob. & Family Ct. Dep't., 49 N.E.3d 230, 242 (Mass. 2016).

186. Marty Beyer, "Visit Coaching and Family Time Coaching: Supporting Families to Meet their Children's Developmental and Separation-Related Needs" (2019) (on file with the North Carolina Law Review); *see also* Beyer, *Visit Coaching*, *supra* note 68, at 52.

187. Edwards, *Foreword*, *supra* note 18, at 1.

188. Douglas F. Johnson, *Babies Cry for Judicial Leadership: Reasonable Efforts for Infants and Toddlers in Foster Care*, EARLY DEV. NETWORK (2007), https://edn.ne.gov/cms/sites/default/files/u1/pdf/17J7%20Babies%20Cry%20for%20Judicial%20Leadership%20pdf.pdf [https://perma.cc/3C4X-6FE9].

189. *See* HHS Memo, *supra* note 15, at 2.

190. For example, Michigan's foster care manual states visitation must be provided with "the lowest level of supervision needed to reasonably ensure child safety." STATE OF MICH. DEP'T OF HEALTH & HUM. SERVS., *supra* note 42, at 5. It goes on to state visitation "must be supervised if any of the following harm factors [are] identified on the most recent safety assessment: caregiver[] caused" the child "serious harm" or made "a plausible threat to cause serious harm[,]" the "parent has threatened

with supervised visitation.[191] State agencies regularly take the position that, when a child is placed in the foster system, visitation must remain supervised pending trial, which can take a year, if not more, in metropolitan areas.[192] The state provides the minimum frequency required and, at times, vehemently contests any suggested increase despite the lack of identified safety risks to the child.[193]

The ironic and unfortunate reality of a system that defaults to minimum supervised visitation is that state agencies claim the default results from limited resources, even though unsupervised visitation is not only more natural and beneficial for families but also more cost-effective.[194] The state's practice of meting out minimal supervised visitation occurs in view of the judiciary, which, Professor Jane Spinak writes, "generally take[s] for granted [the fact that] 'the state's ability to'" adequately serve families "is constrained by financial limitations."[195] In fact, retired Judge Leonard Edwards voiced that few judges were satisfied with the quantity of visitation offered to families seeking to reunify; yet judges "seemed at a loss about how to address the problem" when the state agency lacked the resources to provide more frequent visitation.[196]

to flee with the child[,]" or the "[c]aregiver's behavior toward[s] [the] child is violent or out-of-control." *Id.*

191. *See* HHS Memo, *supra* note 15, at 5; Edwards, *Foreword*, *supra* note 18, at 35.

192. *See, e.g.*, *In re* Nevaeh N., 2017 WL 3272166, at *1–3 (N.Y. Fam. Ct. May 31, 2017) (unpublished table decision); *In re* I.R., 7 N.Y.S.3d 849, 850–52 (Fam. Ct. 2015); Samuel W. v. Luemay F., 2015 WL 5311117, at *2–3 (N.Y. Fam. Ct. Sept. 2, 2015) (unpublished table decision).

193. *See, e.g.*, Care & Prot. of Walt, 84 N.E.3d 803, 809–11 (Mass. 2017). Walt, a three-year-old, and his father were permitted two visits per month for one hour per visit after a child protective services caseworker, within ten minutes of entering the family's home, decided that Walt was at risk of neglect and placed him in foster care based on the condition of the home and the parents' admitted marijuana use. *Id.* The state agency appealed the court order increasing the visitation provided by the state to four visits per week. *Id.*

194. Ryan Murray, executive director of the Washington Association of Child Advocate Programs, addressed this contradictory reality in his testimony before the Washington State Legislature:

> Too often our system chooses to use supervised visitation for the seeming convenience factor of the professionals [involved] in the case. With supervised visitation comes child transportation, vetting of a would-be supervisor or monitor of the visits, and visit supervisor notes to name a few. We have set up our system so that it is easier for supervised visits to be arranged than the more natural and more cost-effective unsupervised alternative.

Hearing 1194, *supra* note 5, at 47:32 (statement of Ryan Murray).

195. SPINAK, END OF FAMILY COURT, *supra* note 31, at 207 (citing scholarship that found "courts generally take for granted 'the State's ability to provide adequate services is constrained by its staff and dollar limitations,' while sometimes the court even explicitly notes that in tough economic times the 'state has a legitimate interest in making the best use of its limited resources.'").

196. Leonard P. Edwards, *Judicial Oversight of Parental Visitation in Family Reunification Cases*, 54 JUV. & FAM. CT. J., Summer 2003, at 1, 4 [hereinafter Edwards, *Judicial Oversight of Parental Visitation in Family Reunification Cases*] ("[F]ew of [the judges] were satisfied with the quantity of visitation offered [to] children and their families during family reunification. Some seemed at a loss about how to address the problem. 'The department doesn't have the resources to provide more frequent visitation' was the most frequently stated response.").

One study of caseworkers' perspectives on visitation unearths not only the disconnect between the purpose of visitation and its implementation, but, additionally, how the state perceives its constrained resources as justification for minimal visitation.[197] This study focused on caseworkers in Illinois, a state identified in federal guidance for its "best practice."[198] The Illinois state agency, DCFS, provides an expansive policy guide for caseworkers on visitation, including the importance of involving the parent and child in the development of the visitation plan, how to assess the level and frequency of supervision, how supervision is to occur, and the ongoing need to adjust and expand visitation as case needs change.[199] Further, the policy provides that "[t]he frequency, duration, and location[] of visitation shall be measured by the needs of the child and family, and *not* by the convenience of [the d]epartment."[200] Yet the study found that caseworkers rarely, if ever, followed their agency's visitation policy.[201] First, the study observed that, of the caseworkers interviewed, few were able to articulate the visitation policy.[202] Further, the interviewed caseworkers believed visitation frequency to be the minimum amount stated in the policy—once per week—rather than a case-by-case determination made in consultation with the family and based on each family's unique circumstances.[203] When asked about expanding visitation from once per week, the interviewed caseworkers responded that lack of time and resources prevented it.[204]

Most importantly, the study revealed caseworkers' collective assumption that, following a child's removal from their parents' care, visitation must be supervised.[205] This assumption, applied universally, results in a cascading effect. By defaulting to supervised visitation, caseworkers bore the responsibility of transporting the child to and from visitation.[206] Caseworkers described the time commitment involved with picking up a child (from a foster placement, school, or activity), transporting the child to the visit, supervising the visit, and then transporting the child to the foster parent after the visit.[207] One caseworker explained, "that is almost three quarters of a day for us. And when we manage caseloads of fifteen, sixteen, seventeen kids, we're limited."[208] When asked

197. Muñoz, *supra* note 38, at xi–xii.

198. HHS Memo, *supra* note 15, at 7.

199. ILL. ADMIN. CODE tit. 89, § 301 (2024).

200. 705 ILL. COMP. STAT. 405/2-10(2) (2024) (emphasis added).

201. Muñoz, *supra* note 38, at 91–93.

202. *Id.* at 92.

203. *Id.* at 91.

204. *Id.* at 92–93.

205. *Id.* at 109.

206. A determination that visitation must be supervised means parents lack the ability to have any contact with their child without the presence of an authorized supervisor.

207. Muñoz, *supra* note 38, at 95–108.

208. *Id.* at 98.

about locating visitation in a parent's home, in accordance with policy,[209] one caseworker with more than five years of experience struggled to answer: "I don't know why I never considered [the visits] in their home. I don't think I've ever heard one of my coworkers doing visits with parent-child in the biological parent's home."[210]

The study also found that caseworkers held supervised visitation in their agency offices, despite their awareness that this location diminished the quality of interaction between parents and their children.[211] Caseworkers described how visits at the agency office put parents "on edge" and made them unable to be themselves in such a "controlled environment."[212] They also described how children "can get really frustrated and bored"[213] when visitation occurs at the agency office, a location the caseworkers themselves described as "sterile" and akin to "a hospital setting."[214]

In this way, the study documented how supervised visitation can function as part of the family regulation system's surveillance apparatus that harms families.[215] One parent questioned the need for state agency supervision while she fed her daughter yogurt.[216] She further described the impact of the supervision: "It's a level of surveillance that makes you feel so uncomfortable. And it damages the bond that you've built, of trust between a parent and child, that the parent has to listen to the stranger berate them."[217]

There is also a political reality to visitation decisions. Inherent tension exists in the dual responsibility of state agencies to prosecute parents and rehabilitate families.[218] As described in Section I.C., family regulation courts remain largely closed to the public, and records are sealed and confidential in

209. ILL. ADMIN. CODE tit. 89, § 301.210(b)(6) (2024) ("When the permanency goal is return home, a visiting plan shall . . . specify visiting in the home of the child's parents, if consistent with the safety and well-being of the child.").

210. *Id.* at 101 (alteration in original).

211. *Id.* at 103.

212. *Id.*

213. *Id.* at 104.

214. *Id.* at 103–05.

215. *See* Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 133 (2020) (describing "the infantilizing supervision of [her own] family" in their fight against child welfare's "surveillant assemblage" (quoting Kevin Haggerty & Richard Ericson, *The Surveillant Assemblage*, 51 BRITISH J. SOCIO. 605, 606 (2000))); *see also* Washington, *Survived and Coerced*, *supra* note 30, at 1106 (citing Dorothy E. Roberts, Keynote Address at the Columbia Journal of Race & Law Symposium: Strengthened Bonds (June 16, 2021) (describing the family regulation system as "a multi-billion-dollar apparatus that relies on terrorizing families by taking their children away or weaponizing their children with the threat of removal to impose intensive surveillance and regulation on them")).

216. Moritz-Rabson, *supra* note 27, at 7.

217. *Id.* at 7–8.

218. *See infra* Section III.D.1.

most states.[219] As a result, the media only shines a spotlight on the family regulation system in the aftermath of a tragedy: a devastating, but exceedingly rare event.[220] State agency employees and their high-level administrators have lost their jobs following such tragedies, as there is no political cover when the public questions their decisions in hindsight.[221]

This reality creates perverse incentives. As described by Professor Christine Gottlieb, "[t]here has never been a [foster agency] in the history of child welfare who has ever been penalized for not helping a family enough . . . . But they are penalized all the time for not doing enough to protect the kid."[222] The former commissioner of the New York City Administration for Children's Services candidly acknowledged that negative media attention drives state agencies to "be more draconian."[223] The system errs towards removing children from their homes even when studies show—and some courts have agreed—that removing a child from their parents' care may be "more damaging to the child than doing nothing at all."[224] Visitation is no different. That is, there is no penalty for providing a family only *de minimis* visitation, particularly when this state action remains hidden from the public.

C. *Conditioned on Parental Obedience*

Both the judiciary and state agencies use a parent's less-than-perfect obedience as a basis to restrict—or even deny—a family's ability to spend time together. Caseworkers withhold visitation based on their personal feelings towards a parent on a given day.[225] Judges limit visitation based on a parent's demeanor in the courtroom[226] or according to a parent's "progress" with their

219. Fraidin, *supra* note 101, at 1; *see also* Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 155–56 (1999); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 1 (2001).

220. Yoav Gonen, Kirstan Conley & Danika Fears, *The Gruesome Details of Zymere Perkins' Abuse—And How ACS Failed Him*, N.Y. POST (Dec. 14, 2016, 10:39 PM), https://nypost.com/2016/12/14/the-gruesome-details-of-zymere-perkins-abuse-and-how-acs-failed-him/ [https://perma.cc/9B7D-WKWE (staff-uploaded, dark archive)].

221. Nikita Stewart, *New York City's Child Welfare Commissioner, Gladys Carrión, Resigns*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/nyregion/new-york-citys-child-welfare-commissioner-gladys-carrion-resigns.html [https://perma.cc/UY53-JYTD (staff-uploaded, dark archive)] (reporting that New York City's child welfare commissioner resigned after two children who were being monitored by the agency were beaten to death in separate incidents).

222. Joyce, *supra* note 76 (including quotes from Professor Christine Gottlieb).

223. *Id.* at 75 (including quotes from ACS Commissioner David Hansell).

224. Nicholson v. Williams, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002); *see also* Trivedi, *The Harm of Child Removal*, *supra* note 30, at 526.

225. *See, e.g.*, FONG, INVESTIGATING FAMILIES, *supra* note 86, at 175 (describing a caseworker that, alluding to the parent's demeanor, stated she was "itching" to cancel the parent's visitation with her son that day).

226. *See, e.g.*, ROBERTS, TORN APART, *supra* note 30, at 131–32 ("When a distraught mother whose child was placed in foster care ran out of the courtroom, the judge reprimanded her by reducing the time she could spend in visits with her child.").

service plan,[227] despite wide acknowledgment by those in the field that service plans are rarely tailored to the individual needs of a family and, instead, are "load[ed] up . . . with more services than parents can manage."[228] With little exception,[229] such coercive action occurs without any indication that visitation presents a safety threat to the child.[230] In doing so, the state disregards the social science research and federal guidance described in Section I.A. It also punishes children for actions over which they have no control.[231]

The case of one young mother and her son, *In re Joziah P.*,[232] illustrates the harm resulting from the state's coercive authority.[233] The state agency conditioned the family's upcoming visit on the mother, Shirley, first participating in a "goal change conference," where the state agency planned to explain why Shirley's young son should be adopted rather than returned to her care.[234] Shirley's son was present at the state agency on the scheduled date when she arrived.[235] Shirley immediately went to him and hugged him.[236] The caseworker informed Shirley that the conference needed to occur *before* the visit could take place.[237] Shirley declined to participate in the conference, which was her right, but agency staff "persisted in trying to move forward with the conference."[238] A verbal altercation ensued and, as a result, no visit occurred that day.[239] Shirley later recounted that she had been extremely upset: "[W]hy would I just tell my [child], oh I can't be with you right now, or I can't hug you because [the caseworker] want[s] to have a conference[.]"[240] Shirley did not go to the agency the following day for her scheduled visit.[241] Shirley also did not respond to the caseworker's texts and emails in the weeks that followed.[242]

227. *See, e.g.*, *In re* A.R., 2022 WL 15596025, at *1 (Pa. Super. Ct. Oct. 28, 2022) (unpublished table decision) ("[V]isitation could increase with frequency and duration and decrease in supervision according to Mother's progress with the court-ordered services . . . .").

228. Joyce, *supra* note 76 (referring to a social worker's description of the meetings at state agencies).

229. *E.g.*, WASH. REV. CODE § 13.34.136(2)(b)(ii)(B) (2024) (providing where visitation cannot be used "as a sanction" for a parent's failure to comply with court orders or services).

230. *See* FONG, INVESTIGATING FAMILIES, *supra* note 86, at 173–75.

231. *See supra* Sections I.A.1., I.A.3 (discussing the social science research establishing that visitation should be viewed as a right of the family, not a benefit to be earned).

232. 2020 WL 3042258 (N.Y. Fam. Ct. May 26, 2020) (unpublished table decision).

233. *See id.* at *10–11.

234. *Id.* at *6.

235. *Id.*

236. *Id.*

237. *Id.* (emphasis added).

238. *Id.* at *5.

239. *Id.*

240. *Id.* at *7.

241. *Id.* at *6.

242. *Id.*

Shortly thereafter, the state agency filed a termination of parental rights petition against Shirley.[243]

The tragedy of the state undermining efforts to keep Shirley and her son connected to each other, played out nearly four years later when the court dismissed the case against Shirley upon the conclusion of a full evidentiary trial.[244] In doing so, the court found that Shirley never neglected her son. The court's written, albeit unreported, opinion states: "Given that [this child] has been in foster care for 3 years . . . the [c]ourt is cognizant that the transition to his mother's care will likely be emotionally difficult for him."[245] This decision is noteworthy for what it does not state: it did not have to be this way.

Coercion undermines efforts to heal and reunify families. A predominate way the state conditions visitation upon parental compliance appears with drug tests, even though drug use does not necessarily indicate an inability to parent.[246] For example, one judge in North Carolina denied visitation between a mother and her seven-month-old infant until the mother "submitted three clean drug tests."[247] The appellate court affirmed that this decision was in the infant's "best interest," yet the opinion lacked any discussion of how suddenly severing contact between a mother and her seven-month-old served this infant's best interest.[248] Additionally, the opinion failed to address whether the state made any efforts to maintain contact while mitigating potential risk of harm to the infant, such as closely supervised visitation.[249]

A parent's inability to submit to drug tests, even when there are no allegations of substance misuse, can also result in restricted visitation. Sociologist Kelley Fong describes how a Rhode Island mother's inability to attend all her drug screenings—when she worked two jobs, and taking the drug test entailed a half-hour drive each way—restricted her visitation with her

243. *Id.* at *8. Shirley herself entered the foster system as a pregnant teenager. *Id.* at *1. She remained placed in the foster system when the state accused her of neglecting her newborn while he was still in the hospital. *Id.* The State then placed Shirley's son in a foster home at the opposite end of New York City. *Id.* at *2. Shirley's case embodies Professor Sarah Katz's observation of the family regulation system holding teenage parents "accountable for failing to have learned the skills that it never taught [them] in the first place." Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 549 (2006). According to Katz, "by giving up on teenage parents the child welfare system creates a self-fulfilling prophecy." *Id.* at 537; *see also* Washington, *Pathology Logics*, *supra* note 30, at 1556 ("Little attention has been paid to children in the foster system who themselves become parents . . . . Available data indicates that the number of pregnant and parenting mothers in the foster system is quite high.").

244. *In re Joziah P.*, 2020 WL 3042258, at *12.

245. *Id.*

246. *Contra* OKLA. STAT. tit. 10A, § 1-4-707 (A)(6)(b) (2024) ("A court may not deny visitation based solely on the failure of a parent to prove that the parent has not used legal or illegal substances or complied with an aspect of the court-ordered individualized service plan.").

247. *In re* P.M., 251 N.C. App. 925, 795 S.E.2d 832, 2017 WL 491253, at *1 (2017).

248. *Id.* at *4.

249. *Id.*

son.[250] Fong observed a visit between this mother and her two-year-old child at a park, supervised by the family regulation caseworker.[251] The young child "bolted at full speed" towards his mother when he arrived, and the two chased each other around the playground.[252] The caseworker reported no concerns about the mother's ability to parent or her conduct at the visits.[253] Fong questioned why the visits had to be supervised.[254] Even though the child's placement in the foster system had nothing to do with substance misuse, the caseworker explained that the judge required the visits to remain supervised because the mother had not attended all of her drug screenings.[255]

Finally, state agencies entice parents to voluntarily relinquish their parental rights, and forgo trial, with promises of visitation after termination of those rights. The state agency will guarantee a nominal number of visits per year, such as four, in exchange for the parent's agreement to surrender their parental rights.[256] If a parent chooses to go to trial and loses, the result is a legal severance of the parent-child relationship and the parent has no right to ongoing contact with the child.[257] One parent described the experience as "a decision that no parent should ever have to make."[258] Simply put, no parent should have to ask themselves: "Should I fight the termination of parental rights . . . or should I 'voluntarily' surrender my parental rights with a small chance that I might get visits and pictures and we might be able to write to each other?"[259] Here, this practice reveals systemic actors' willingness to "drop the façade of acting in the best interests of the child" because post-adoption visitation hinges not on what is best for the child, but on whether the parent relieved the state of its evidentiary burden to prove at trial.[260]

D. *State-Created Evidence*

The vast discretion afforded to state agencies to determine and implement visitation puts the state in the curious position of creating evidence. State

250. FONG, INVESTIGATING FAMILIES, *supra* note 86, at 173.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 184.

257. Increasingly, proposed state legislation across the country aims to provide contact between children and their parents post-termination of parental rights. *See, e.g.*, Preserving Family Bonds Act, S.B. 6720, 2023–2024 Leg., Sess. (N.Y. 2023) (vetoed by Governor on Dec. 8, 2023); *see also* Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 326–28 (2008).

258. Sara Werner, *I Was Pushed to "Voluntarily" Surrender My Rights—And Still Didn't Get to Visit My Daughter*, RISE MAG. (Nov. 16, 2021), https://www.risemagazine.org/2021/11/pushed-to-surrender-my-rights/ [https://perma.cc/N76L-HV6C].

259. *Id.*

260. FONG, INVESTIGATING FAMILIES, *supra* note 86, at 185.

agencies use their evidence to support their position on a given issue in a case. Courts rely heavily—at times, exclusively—on the recommendation of the state agency. This section addresses the evidence created by visitation and filtered through the lens of both the state agency and foster parents, who function as arms of the state.

1. Filtered Through the Lens of the Agency

Inherent conflict exists in the role of state agencies as visitation decisionmakers and evidence creators. The permanency timeline mandated by ASFA incentivizes caseworkers to document any potential negative interaction between a parent and their child during a visit in the event that the state agency one day must file a petition to terminate parental rights.[261] This inherent conflict inevitably impacts the agency's position on visitation. In one case in New York, the state agency vehemently opposed providing a father and son thirty minutes of unsupervised visitation when the record evidenced consistent supervised visits, no safety concerns, and a bond between the father and son.[262] The state agency argued that thirty minutes of unsupervised visitation "*could* cause the child emotional harm because [the father's] parental rights *might* be terminated."[263] The agency had filed a petition to terminate the father's parental rights, pursuant to the timeclock imposed by ASFA,[264] but the court had not yet scheduled a hearing date.[265] The agency's efforts to terminate parental rights likely influenced its position on visitation because, arguably, expanding visitation and strengthening the parent/child relationship could have created evidence in support of continuing efforts towards family reunification.

Another way that evidence is filtered through the lens of the state agency occurs in caseworker testimony and court reports. In the family regulation system, parents are rarely viewed as experts on their children.[266] Rather, the caseworkers employed by the state agency are regularly referred to as "child protective specialists" or social workers, even though they are not required to have social-work degrees.[267] Professor Washington has described the system's creation of "perpetual witnesses" through its surveillance of families for long periods of time.[268] The central function of the caseworker "is to assess the family

261. *See supra* Part II (discussing ASFA's mandates).

262. *In re* Gerald Y.-C., 54 N.Y.S.3d 10, 11 (N.Y. App. Div. 2017).

263. *Id.* (emphasis added).

264. *See supra* note 127 and accompanying text.

265. *In re Gerald Y.-C.*, 54 N.Y.S.3d at 12.

266. *See generally* Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777 (2022) (observing increased consideration of lived experience as expertise).

267. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 138 (2019).

268. Washington, *Pathology Logics*, *supra* note 30, at 1545.

on an *ongoing* basis"[269] and, in this role, "they opine about the meaning and appropriateness of a parent's behavior, demeanor, and general capabilities as a parent over extended periods of time."[270]

Customary evidence in family regulation cases consists of caseworker notes and reports.[271] At one point during one mother's "long and arduous" two-year journey to reunify with her son, she missed a couple of visits due to her work schedule.[272] While the case records accurately documented the work conflicts, the caseworker still wrote, "[i]t appears that Mom is exhibiting signs that she does not want visits with her son."[273] State agencies often fault parents for "inconsistency," despite the reality of parents like this mother and qualitative data that indicates inconsistency between parents' stated goals and follow-through may be partly due to parents' feelings of being alienated by the system ostensibly designed to help them.[274]

The state's control over a family's contact with each other—and the resulting evidence created by that contact—impacts case outcomes. As demonstrated by the case of T.J. at the outset of this Article,[275] the power of the foster agency to *not* exercise its court-ordered discretion to expand visitation became evidence—"[i]n view of the highly structured, supervised visitation"[276]—upon which the trial court relied to determine that time had run out and the parents were not capable of parenting. Had the agency exercised its discretion and progressively expanded visitation as outlined by the court—first unsupervised day visitation, then overnight visitation, and finally, a sixty-day home visit—that could have created evidence tending to support the parents' ability to parent.[277]

The appellate court in T.J.'s case astutely noted one of the court reports prepared by the state agency and submitted to the court contained "more advocacy than fact."[278] This report was submitted to the trial court when the

269. *Id.* at 1547.

270. *Id.* at 1548. During my representation for nearly a decade of both parents and children in the family regulation system, I regularly read court reports filled with a caseworker's subjective assessment of supervised visitation, such as a parent "failed" to stop their child from throwing toys, a parent "was unable" to calm their crying child, the child "appeared angry" and did not "seem" to want to be at the visit.

271. Washington, *Pathology Logics*, *supra* note 30, at 1565–66.

272. FONG, INVESTIGATING FAMILIES, *supra* note 86, at 176–77 ("Low-wage work hours are often unpredictable; missing a shift may mean being let go.").

273. *Id.*

274. *See, e.g.*, Sykes, *supra* note 78, at 449.

275. *See supra* Introduction.

276. Tracy J. v. Super. Ct., 136 Cal. Rptr. 3d 505, 511 (Cal. Ct. App. 2012).

277. *See* Samuel W. v. Luemay F., 2015 WL 5311117, at *1 (N.Y. Fam. Ct. Sept. 2, 2015) (unpublished table decision) (where progressively expanded visitation ultimately resulted in family reunification).

278. *Tracy J.*, 136 Cal. Rptr. at 513.

state agency sought to move towards terminating parental rights.[279] Illustrating the profound implications of such reports, the trial court in T.J.'s case granted the agency's requests to both cease providing reunification services and schedule a hearing to terminate parental rights.[280] In this way, the judiciary regularly treats reports prepared by the state agency as "competent evidence" upon which to rule in favor of the state agency's position, even when the record tells otherwise.[281]

2. Foster Parents as Arms of the State

Foster parents are not neutral observers. Both financial and emotional incentives—including a desire to adopt—affect foster parents. A foster parent's judgment towards a parent, even unknowing and unintentional, may cloud their observations and recollection.[282] As state agencies must document their interactions with foster parents, the foster parent's account becomes memorialized as evidence upon which both the state agency and court rely.[283]

Foster parents influence visitation. Their untrained, subjective opinions about a child's behavior before or after visitation serves as evidence.[284] Such evidence may be used to restrict a family's contact despite the established social science research, described in Section I.A.3, that explains the varied reactions a

279. *See id.* at 509.

280. *Id.* at 511.

281. For example, in *In re T.R.B.*, 272 N.C. App. 222, 843 S.E.2d 488, 2020 WL 3251031 (2020) (unpublished table decision), the court granted the state agency's request to restrict visitation in both frequency and duration based on the state agency's "competent" court report and the testimony of the caseworker. *Id.* at *3. The caseworker's testimony included a description of the mother bringing "snacks, microwavable meals, diapers and wipes" to visits with her eighteen-month-old son. *Id.* at *1. Further, the caseworker testified that there were "no problems" during the visits. *Id.* The only proffered reason for the state agency's request to restrict visitation was the caseworker's subjective, summary conclusion that to "do things in that [visitation] room is not real life." *Id.* Thus, the state agency dictated the visitation—supervised at the agency—and then used its prescribed visitation as evidence to further diminish contact between this mother and child. *See id.*

282. UNIV. OF PITTSBURGH OFF. OF CHILD DEV., *supra* note 80, at 1 ("Foster parents may not like the birth parents or feel their role is threatened by them.").

283. For example, in T.J.'s case, the state agency placed T.J. in a pre-adoptive home when he was nine days old. *Tracy J.*, 136 Cal. Rptr. at 508–09. At some point during the placement, the state agency permitted the foster parent to supervise a visit between T.J. and his parents. *See id.* at 509. Later, the caseworker cited the foster mother's account of the visit as an example of the parents' inability to parent T.J. *Id.* However, on appeal, the appellate court overturned the trial court and found that "some details of the foster mother's account of the visit were contradicted" by other professionals present at the visit. *Id.* at 508–09.

284. One parent described how the foster parent "would say my daughter acted out after visits and she blamed me." Wanda Chambers, *Forever Family*, RISE MAG. (Nov. 18, 2020), https://www.risemagazine.org/2020/11/forever-family-2 [https://perma.cc/8ZY3-KMDA].

child placed in the foster system may have before, during, or after a visit with their parent.[285]

Even in the rare instance when a foster parent's account is questioned by the state agency, courts remain largely deferential to foster parents.[286] For example, in Washington, a guardian *ad litem* filed a motion to suspend visitation between a mother and her two sons based on concerns reported by the foster parent.[287] The foster parent claimed the children had "severe" physical and emotional responses both before and after visits with their mother.[288] However, when a social worker observed a two-hour visit between the mother and one of her sons, she saw "nothing that was a cause for great concern."[289] Further, the social worker noted: "fear, anxiety, and/or sadness of separation that stems from both anticipating and leaving a visit, may cause a child to act out."[290] No evidence was presented that this mother caused harm to her sons during their visits.[291] Yet, the trial court granted the guardian *ad litem*'s motion and suspended visitation between the mother and her sons.[292]

Social science research notes that foster parents may not like the child's parents or may feel their role is threatened by them.[293] A foster parent's attitudes and behaviors can impact a child's visit with their parent. One study found that thirty-four percent of foster parents believed that the visitation arrangement was not in the best interest of the children in their care.[294] This study further found that forty-nine percent of foster parents believed children experienced difficulties during their contact with family.[295] Alarmingly, another

285. Eli Hager, *When Foster Parents Don't Want to Give Back the Baby*, PROPUBLICA (Oct. 16, 2023, 6:00 AM), https://www.propublica.org/article/foster-care-intervention-adoption-colorado [https://perma.cc/AE3D-HDV8] (describing how a social worker opposed the child's return to his parents on the grounds that the foster parents, who sought to adopt the child, had reported that the child "pitched fits and struggled to eat and sleep" after visits with the parents); *see also In re* L.B., 229 A.3d 971, 974 (Pa. Super. Ct. 2020) (describing where the foster parent reported the child "hasn't had as many tantrums and outbursts" since the suspension of the father's visits); *In re* J.B., No. 746, 2023 WL 7627776 (Md. App. Ct. 2023) (describing where the foster parent reported the child's sleep was deteriorating and he was presenting with "extreme anxiety" after visits with his mother).

286. *See, e.g.*, *In re* Dependency of Tyler L., 208 P.3d 1287, 1289 (Wash. Ct. App. 2009).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 1290.

292. *Id.* at 1288.

293. *See* UNIV. OF PITTSBURGH OFF. OF CHILD DEV., *supra* note 80, at 1.

294. Sue Moyers, Elaine Farmer & Jo Lipscombe, *Contact with Family Members and Its Impact on Adolescents and Their Foster Placements*, 36 BRITISH J. SOC. WORK 541, 549 (2006).

295. *Id.*

study suggested that caseworkers reduced visitation if they feared foster parent displeasure with contact between children and their parents.[296]

Systemic actors—namely, judges, the state agency, and child advocates—view foster parents as resources in whom to invest, while the child's parents may be viewed as inherently flawed and sources of harm to the child. The strength of the relationship between a parent and child is never, standing alone, legally sufficient for a family to reunify.[297] However, the strength of the relationship between a foster parent and child can be legally sufficient to deny family reunification.[298]

IV. RETHINKING VISITATION

Part I addressed why visitation matters. Part II described the legal framework governing visitation. Part III demonstrated how, and the extent to which, default visitation practices thwart a separated family's ability to reunify and, in doing so, often destroy the parent-child relationship. This part argues that we must meet the needs of all families outside a system of punishment while maintaining an "openness to unfinished alternatives,"[299] all while using the tools available to us. First, this part presents model legislation as a non-reformist reform that seeks to "unravel rather than widen the net of social control."[300] Second, with model legislation as a starting point, this part then asserts that the solution to the visitation problems illustrated throughout this

296. Andrew Sanchirico & Kary Jablonka, *Keeping Foster Children Connected to Their Biological Parents: The Impact of Foster Parent Training and Support*, 17 CHILD & ADOLESCENT SOC. WORK J. 185, 188 (2000).

297. In her book *The End of Family Court: How Abolishing the Court Brings Justice to Children and Families*, Professor Jane M. Spinak describes the case of a mother named Sherry and her daughter, Nicole, who was placed in the foster system. SPINAK, END OF FAMILY COURT, *supra* note 31, at 204–06. Everyone agreed there was a "close bond" between this mother and child. *Id.* at 205. Sherry attended twice-weekly supervised visits and used parent counseling to improve her parenting skills. *Id.* Yet, citing ASFA and the "time-limited reunification services," the court terminated Sherry's parental rights to Nicole. *Id.* Professor Spinak writes that the decision, upheld on appeal, was not in Nicole's best interest—"severing the one parental bond she had for a yet-unidentified new parent." *Id.* at 206.

298. For example, in *T.W. v. Super. Ct.*, E068439, 2017 WL 3947663 (Cal. Ct. App. Sept. 8, 2017), the court noted that the mother's "compliance with her reunification service plan is commendable, but not dispositive" and considered "other factors, including, but not limited to whether changing custody will be detrimental because severing a positive loving relationship with the foster family will cause serious, long-term emotional harm." *Id.* at *6.

299. Allegra McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 109 (2013).

300. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007); *see also* Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/H4RJ-PXQD] (describing "non-reformist reforms" as "those measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crisis it creates"). *See generally* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 100–01 (2020) (examining the history and use of non-reformist reforms).

Article is as simple as it is transformational: shrink the number of children unnecessarily removed from their families every year. This part seeks to bolster conversation and inspire imaginations about how we can support vulnerable families.

A. *Recommended Model Legislation*

After analyzing the numerous benefits and concerns regarding visitation practice, this section proposes statutory language that can be adopted throughout the United States. Model legislation that redresses the harms inflicted by current widespread visitation practices presents the starting point. The jurisdictional and indiscriminate way that visitation law applies across the United States, with disparities emerging at a state and even county level, accentuates the need for model legislation. Few would claim that children's well-being is safeguarded by long stays in the foster system and destruction of the parent-child relationship. Legislatures themselves acknowledge that children's "unnecessarily protracted stays" in the foster system "may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens."[301] The model legislation proposed below draws from the best features of current state statutes and policies to create legislation that promotes the well-being of children while simultaneously protecting their safety. Recognizing that language can be a tool for transformation,[302] this model legislation uses the term, "family time," rather than "visitation." The term, "family time," accurately captures that both parents *and* children maintain a right to contact with each other and sharing time together is essential for a healthy family.[303]

Model legislation:

An Act

Regarding the strengthening of family time during child welfare proceedings

Section 1: Short Title

This chapter shall be known as "The Strengthening Family Time Act"

301. N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 2023).

302. *See* Washington, *Pathology Logics*, *supra* note 30, at 1582 (citing Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437–38 (1989)).

303. *See supra* note 17 and accompanying text.

Section 2: Purpose

(a) The purpose of this chapter is to preserve and strengthen the parent-child relationship when a family comes within the jurisdiction of the child welfare court.

(b) Family time is the right of the family, including the child and the parent, when the state has removed a child from the custody of their parent.

(c) Early, consistent, and high-frequency family time in the least restrictive and most natural setting possible is crucial for maintaining parent-child relationships, mitigating the trauma of family separation, and allowing family reunification to be achieved and sustained.

Section 3: Family Time Implementation

(a) Upon a court determination that releasing a child to their parent pending the adjudication of child maltreatment would present an imminent threat of substantial harm to such child and ordering the child to be placed out of their home, the court forthwith shall order a family time plan that is individualized to the needs of the family and addresses:

1. First contact: The first in-person contact between a parent and child must take place within 48 hours of the state taking custody of the child, unless the court finds that extraordinary circumstances require delay. A state agency's lack of sufficient resources shall not constitute extraordinary circumstances.

2. Frequency: The family time plan shall provide the maximum in-person time possible. Maximum shall be presumed to mean daily in-person family time and shall not be determined by the resources of the state agency nor the availability of the foster parent. The family time plan should include virtual family time, but virtual family time shall not replace in-person time.

3. Natural Setting: Family time shall be incorporated into the child's routine and organized around activities that encourage the parent to engage in the parenting role, such as doing homework, providing meals, attending school and medical appointments, grocery shopping, and recreational outings.

4. Least Restrictive Supervision: Family time must be provided with the lowest level of supervision needed to reasonably ensure child safety. Family time shall be unsupervised unless the court finds that presence of risk or danger to the child's safety requires the constant presence of a supervising adult to ensure the safety of the child. If the child's safety requires the constant presence of a supervising adult, supervision shall be

provided by community resources, relatives, and nonstate agency professionals trained to strengthen the parent-child relationship.

5. Transportation: The state agency shall ensure the safe transportation of both the parent and child to and from family time.

Section 4: Family Time Modification

(a) Family time may be limited or denied only if the court determines that such limitation or denial is necessary to protect the child's safety. In making its determination, the court shall consider that perceived negative responses from a child before, after, or during family time may indicate a child's strong attachment to their parent and need for more, not less, family time; and

(b) Family time shall never be limited as a sanction for a parent's lateness to or cancellation of family time nor for non-compliance with court orders or services where the safety of the child is not at risk as a result of the family time.

Section 5: Family Time Continual Assessment

(a) If the court previously ordered that family time between a parent and child be supervised, there shall be a presumption that such supervision will no longer be necessary at the subsequent court appearance. To overcome this presumption, a party must provide a report to the court including evidence establishing that removing supervision would create a risk to the child's safety, and the court shall determine whether supervision must continue.

Section 6: Failure to Implement Family Time

(a) The court shall advise the petitioner that the failure to provide court-ordered family time will result in a finding that the petitioner failed to make reasonable efforts. The lack of sufficient contracted nonstate agency professionals to supervise family time will not excuse the failure to provide court-ordered family time; and

(b) The state agency shall forthwith make-up any family time it failed to provide in accordance with the scheduling needs of the parent.

B. *Re-imagining Child Protection*

Our work does not end with adoption of the model legislation. As this Article has demonstrated, it is a false choice between expanding parent-child contact and keeping children safe. Restricting a family's ability to be together rarely promotes children's well-being. Further, flooding the system with state agency supervised visitation for the hundreds of thousands of separated families

every year spreads staff time and resources thin. If anything, child protection work means improving the circumstances under which families and communities raise children. Attorney and activist Erin Miles Cloud urges us to "envision a world where families are safe not because we have threatened, punished, or policed them, but because we have built up community, prioritized equitable distribution of material resources, and regarded families and neighbors as the first response to trauma."[304]

Imagine, as a thought experiment, that the state only removed children from their parents' custody upon the court finding that such removal is necessary to avoid imminent risk to the child's life or health; no orders or services exist to reduce the risk; and the child remaining in the home would be more harmful than removing the child from their parents' custody. Imagine that parents and their children placed in the foster system spent time together in ways that comport with each family's routines, preferences, and values. Some families who are temporarily separated by the state would attend church together every Sunday morning. Other families would walk to and from school together. Depending on the family, contact might revolve around meals, bedtime, extracurricular activities, holidays, birthdays, medical appointments, and school events. Parental expertise would play a role in determining the kind of contact best suited for a particular family.[305] Parents could choose to participate in offered programs, such as parent-child therapy, in order to gain new parenting skills and strengthen their relationship with their child.[306] If it was determined that supervision was absolutely essential to protecting the child's safety, then contact would be supervised by an entrusted friend, relative, community member, or nonstate agency professional and the need for ongoing supervision would be continually assessed.[307] This type of contact would reflect

304. Erin Miles Cloud, *Toward the Abolition of the Foster System*, SCHOLAR & FEMINIST ONLINE (2019), http://sfonline.barnard.edu/toward-the-abolition-of-the-foster-system/ [https://perma.cc/F79V-UUHR]; *see also* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2562 (2023) (asserting that "the non-reformist reform gestures beyond the law and what the state allows").

305. *See* Washington, *Pathology Logics*, *supra* note 30, at 1579 (arguing that parental expertise should play a crucial role in deciding whether to separate a family).

306. Sara, a mother whose child was placed in the foster system, explained the parent-child therapy she experienced at the Albert Einstein Early Childhood Center. *See* Kira Santana & Sara Werner, *'It Helps You Create That Special Bond*,' RISE MAG. (Aug. 2015), https://www.risemagazine.org/wp-content/uploads/2015/08/Rise_issue_26-healing-together.pdf [https://perma.cc/S2GH-E2K3]. She described how she became involved: "Nobody forced me to come here. I chose to come." *Id.* Sara further reported, "if you have the chance to come to this kind of parenting program, I would recommend it. Definitely." *Id.*

307. Washington, *Pathology Logics*, *supra* note 30, at 1534; *see also* Care & Prot. of Walt, 84 N.E.3d 803, 817 (Mass. 2017) (noting that even though the child's aunt was present, willing, and able to take the child, but the family regulation investigator refused and placed the child in foster care with a stranger). Scholars examining "cross-system surveillance" have observed its impact on kinship

what it is and means to be family. Such contact would also take steps towards mirroring the type of contact and decision-making authority that has long been recognized in private family law.[308]

There are pitfalls ahead when solely pursuing the model legislation provided in the previous section. It is possible that such legislation would merely serve as "window dressing," like other aspects of family regulation legislation.[309] If we offer parents maximum visitation and they miss their visits, will we blame them? It is probably more likely for us to think about "blaming" them for missing a visit instead of thinking about missing visits as caused by stress, trauma, and other troubling factors.[310] Additionally, the model legislation requires a judge to evaluate the individual needs of a family and, thus, is only as robust as a judge's willingness to meaningfully evaluate. Judges make decisions based on their own personal preferences, biases, or past experiences.[311] Yet as long as judges have discretion, they will always be tasked with striking a balance among information presented to them. That is an unavoidable consequence of being empowered to make decisions about someone else's life and family. The onus rests on the judiciary to step up and perform its role of meaningful oversight of executive state action that has far too long harmed vulnerable families.

As Professor Spinak asked, what happens when judges stop collaborating with state agencies and instead apply the law?[312] One noteworthy study of a single judge in New Orleans concluded that her disciplined approach to rigorously applying the law dramatically reduced the number of children in the

networks. *See, e.g.*, Charlotte Baugham, Tehra Coles, Jennifer Feinberg & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 506 (2021). In particular, family members cannot rely on each other due to prior criminal legal involvement or family regulations investigations. *See id.* at 523.

308. Parenting plans in private family law allocate not only a detailed schedule designating the child's physical presence on any given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, but also the multiple facets of a parent's decision-making authority, such as education, health care, religious upbringing, and emergency decisions affecting the health or safety of the child. *See, e.g.*, WASH. REV. CODE § 26.09.184 (2024).

309. *See supra* notes 153–59 and accompanying text.

310. Since at least 2020, federal guidance explicitly implores "[w]hen a parent cannot attend a visit, it is important not to assume a lack of interest." HHS Memo, *supra* note 15, at 9.

311. Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 560 (2022). Legal scholarship growingly examines the role of the judiciary in civil trial courts, where the issues at stake in these courts "are deeply connected to fundamental needs such as safety, intimate relationships, housing, and financial security." *Id.* at 512; *see also* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 268 (2018); Tonya L. Brito, Kathryn Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1243 (2022).

312. *See* SPINAK, END OF FAMILY COURT, *supra* note 31, at 279.

foster system while ensuring their safety.[313] Isolated examples exist of courts' abilities to thoughtfully weigh the ongoing contact that should occur between a parent and their separated child.[314] More judges must do the same.

This Article's illustration of the family regulation system's destruction of the parent-child relationship points to the need to shrink the number of children removed from their parents' custody every year and placed in a system that, as Professor Sarah Lorr asserts, itself produces disability.[315] Ample evidence demonstrates that wide-scale government policies that reduce childhood poverty by increasing family income and meeting families' material needs for housing, food, and health care would dramatically lessen the harms to children that the family regulation system claims—and fails—to address.[316] For example, one study found that family reunification was likelier when parents received cash assistance and housing and less likely when they received other types of services.[317] Children flourish when their parents have what they need. While child safety is often pitted against the rights of parents,[318] enhancing the conditions under which parents raise their children is child protection work. In one study of New York City during the global COVID-19 pandemic, Professor Anna Arons found that while the number of family regulation reports, investigations, and child removals dropped significantly, children remained just as safe.[319] Based on this study, other work calls for the family regulation system

313. *See* Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. 496, 497–98 (2022).

314. *See, e.g.*, *In re* Jose F., 2020 WL 8262246, at *6 (N.Y. Fam. Ct. Dec. 21, 2020) (unpublished table decision) (granting the father one hour of unsupervised visitation as long as he "is calm and mentally stable" during the initial supervised portion of the visit); *In re* MG, 2021 WL 820039, at *1 (N.Y. Fam. Ct. Feb. 9, 2021) (unpublished table decision) (incrementally expanding the father's visits with his son from fully supervised to partially supervised until the family safely reunified); *In re* Legend J., 2019 WL 9202579, at *3 (N.Y. Fam. Ct. Aug. 7, 2019) (unpublished table decision) (holding that the state agency met its burden to take temporary custody of a newborn *and* that the parents demonstrated the ability to safely care for their newborn for more extended periods of unsupervised time).

315. *See generally* Lorr, *Disabling Families*, *supra* note 3, at 9 (arguing the family regulation system constructs and reinforces disability as a social category and causes or exacerbates impairments that render families more likely to become disabled over time).

316. ROBERTS, SHATTERED BONDS, *supra* note 30, at xii; *see also* Andy Newman, *How $1000 a Month in Guaranteed Income Is Helping NYC Mothers*, N.Y. TIMES, https://www.nytimes.com/2022/01/18/nyregion/guaranteed-income-nyc-bridge-project.html [https://perma.cc/2AAG-UPE6 (staff-uploaded, dark archive)] (last updated Jan. 19, 2022) (describing a privately funded program that provides parents with financial support and, in turn, has promoted family well-being).

317. Tyrone Cheng and Allison X. Li, *Maltreatment and Families' Receipt of Services: Their Associations with Reunification, Kinship Care, and Adoption*, 93 FAMS. SOC'Y: J. CONTEMP. SOC. SERVS. 189, 189 (2012).

318. ROBERTS, TORN APART, *supra* note 30, at 130 (describing how "[j]udges frame the legal issues as a contest between the child's safety and the parent's rights, giving a moral advantage to" the state).

319. Anna Arons, *An Unintended Abolition: Family Regulation During the Covid-19 Crisis*, 12 COLUM. J. RACE & L.F. 1, 18 (2022).

to reduce the number of families it needlessly separates.[320] In this way, the solution to the pervasive problem of visitation is as simple as it is transformational: reduce the number of children unnecessarily separated from their parents. The case of Shirley and her son described in Section III.C supports this solution, as her son never should have been separated from her.[321] It is also quite possible that many of the children discussed in cases throughout this Article could have remained safely in their parents' care with appropriate supports in place. Of course, reforms that produce a system radically outside the status quo may be met with resistance precisely because they seem too unrealistic given mainstream views of the family regulation system as a suitable mechanism to respond to "child protection." Yet reforms that function to build and shift power in fundamental ways might be both feasible and effective enough to chart a path towards transformation that actually supports families.

CONCLUSION

The enforcement of visitation laws—typically overlooked in a literature that focuses on the obvious harm of child removal—is itself a mechanism for defining and reinforcing norms regarding which families deserve to be together. This Article expands ongoing scholarly discussions, informed by individuals with lived experience, aimed at challenging the devastating overreach of state intervention via the family regulation system. This Article offers visitation as an example of the family regulation system's role as an instrument for social control and provides a specific context to illustrate how that social control takes place. Understanding how the state's use of visitation law can destroy the parent-child relationship is an important discussion during a moment when social movements are pushing for transformative change to, if not abolition of, the family regulation system.

This Article ends where it began: with the case of T.J. and his family. More than two years after the state removed T.J. from his parents' care and placed him in the foster system, the appellate court found that the state agency "unreasonably limited visitation."[322] While some hope exists in the appellate court's recognition of the importance of visitation and willingness to overturn the trial court, the decision came too late to be of practical benefit. T.J. and his parents were deprived of meaningful contact for two years.[323] Further, the

320. *See, e.g.*, Melissa Friedman & Daniella Rohr, *Reducing Family Separation in New York City: The Covid-19 Experiment and a Call for Change*, 123 COLUM. L. REV. F. 52, 52 (2023). This argument is not new, as scholars have long documented the unnecessary removal of children from their parents' custody. *See, e.g.*, Sankaran & Church, *supra* note 53, at 207.

321. *In re* Joziah P., 2020 WL 3042258 (N.Y. Fam. Ct. May 26, 2020) (unpublished table decision).

322. Tracy J. v. Super. Ct., 136 Cal. Rptr. 3d 505, 509 (Cal. Ct. App. 2012).

323. *See id.* at 508.

appellate court ordered the state agency—the same agency that sought to permanently and irrevocably terminate T.J.'s parents' parental rights—to expand the parents' visitation with T.J. "as appropriate."[324] Visitation remains both under the radar and squarely in the center of conversations about state regulation of families.

324. *Id.* at 515.